FBI COMPLIANCE WITH THE FREEDOM OF INFORMATION ACT

HEARING

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

SECOND SESSION

APRIL 10, 1978

Printed for the use of the Committee on Government Operations

U.S. GOVERNMENT PRINTING OFFICE
31-335 O WASHINGTON : 1978

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CONTENTS

APPENDIXES

FBI COMPLIANCE WITH THE FREEDOM OF INFORMATION ACT

MONDAY, APRIL 10, 1978

HOUSE OF REPRESENTATIVES,
GOVERNMENT INFORMATION
AND INDIVIDUAL RIGHTS SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2203, Rayburn House Office Building, Hon. Richardson Preyer (chairman of the subcommittee) presiding.

Present: Representatives Richardson Preyer, Peter H. Kostmayer, and Ted Weiss.

Also present: Timothy H. Ingram, staff director; Richard L. Barnes, professional staff member; Maura J. Flaherty, clerk; and Catherine Sands, minority professional staff, Committee on Government Operations.

Mr. PREYER. The committee will come to order.

This morning the subcommittee will hear testimony from the General Accounting Office on the findings of its study of the Federal Bureau of Investigation's handling of Freedom of Information Act requests.

During the 94th Congress, the subcommittee—along with members of the House Judiciary Subcommittee on Civil and Constitutional Rights—requested the General Accounting Office to examine the problem of lengthy delays in the processing of Freedom of Information requests by the FBI. The subcommittee was concerned about the enormous backlog of citizen records requests and about complaints that the FBI was not providing specific reasons to requesters for denying documents.

Mr. Victor Lowe, who is Director of the General Government Division of the GAO, will present to us today the study's conclusions.

Mr. Lowe, it is a tradition of this subcommittee that we swear all of our witnesses. Would you and any of your staff who may be answering any questions today please stand and be sworn.

Do you swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

[Witnesses say "I do."]

Mr. PREYER. Mr. Lowe, members of the subcommittee have been supplied advance copies of the GAO report. Would you please introduce those accompanying you and then proceed in any way you would like.

Without objection, a copy of your report will be inserted in the record at this point.

[A copy of the GAO report, "Timeliness and Completeness of FBI Responses to Requests Under Freedom of Information and Privacy Acts Have Improved" (GGD–78–51, Apr. 10, 1978), is contained in the subcommittee files. Additional copies may be obtained from the General Accounting Office, Washington, D.C. 20548.]

Mr. PREYER. Mr. Lowe, you may proceed.

STATEMENT OF VICTOR L. LOWE, DIRECTOR, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE; ACCOMPANIED BY JOHN OLS, ASSISTANT DIRECTOR, GGD; RUBEN CORTINA, SUPERVISORY AUDITOR, GGD; AND ROBERT CRYSTAL, ATTORNEY, OFFICE OF GENERAL COUNSEL

Mr. LOWE. Thank you, Mr. Chairman.

On my right is Mr. John Ols, Assistant Director in our Genera[1] Government Division. He is in charge of our work in the Justice Department. On my left is Mr. Ruben Cortina, who is the principal assistant in charge of this work. On my extreme left is Mr. Robert Crystal from our Office of General Counsel. He has also helped us considerably with complicated problems.

I do have a brief statement, Mr. Chairman. I will proceed any way you would like. If you would like, I will read it into the record. It is about 10 pages.

Mr. PREYER. Why don't we proceed with the reading of your statement, at least the most pertinent parts of it, into the record.

Mr. LOWE. All right, sir.

As requested, our testimony today deals with the results of our review of the FBI's handling and responsiveness to Freedom of Information and Privacy Acts requests for information contained in its files.

The FBI, in the last 3 years, has received over 48,000 requests and estimates that requests will probably increase at a rate of 14 percent a year. This would result in about 20,000 and 23,000 information requests to the FBI in 1978 and 1979. Because of this heavy demand for information, the FBI has had to improve its organization structure and processing procedures.

In response to your subcommittee's requests and other expressions of congressional interest in this subject area, we are issuing today our report entitled "Timeliness and Completeness of FBI Responses to Requests Under the Freedom of Information and Privacy Acts Have Improved."

To evaluate the FBI's efforts, we sampled: 196 cases to assess the FBI's processing system, and 272 cases to ascertain the time needed to process a request, and 34 cases to determine the appropriateness of the exemptions used.

We were provided access to the information needed to conduct our review, and we believe the observations and conclusions we have today are valid. The scope of our work is set out on page 77 of our report.

Our review showed that the FBI has improved its processing of requests and its responsiveness to requesters by making various management improvements. However, areas still exist where the FBI can make further changes to improve its operations and be even more responsive. In addition, we believe legislation is needed to change the

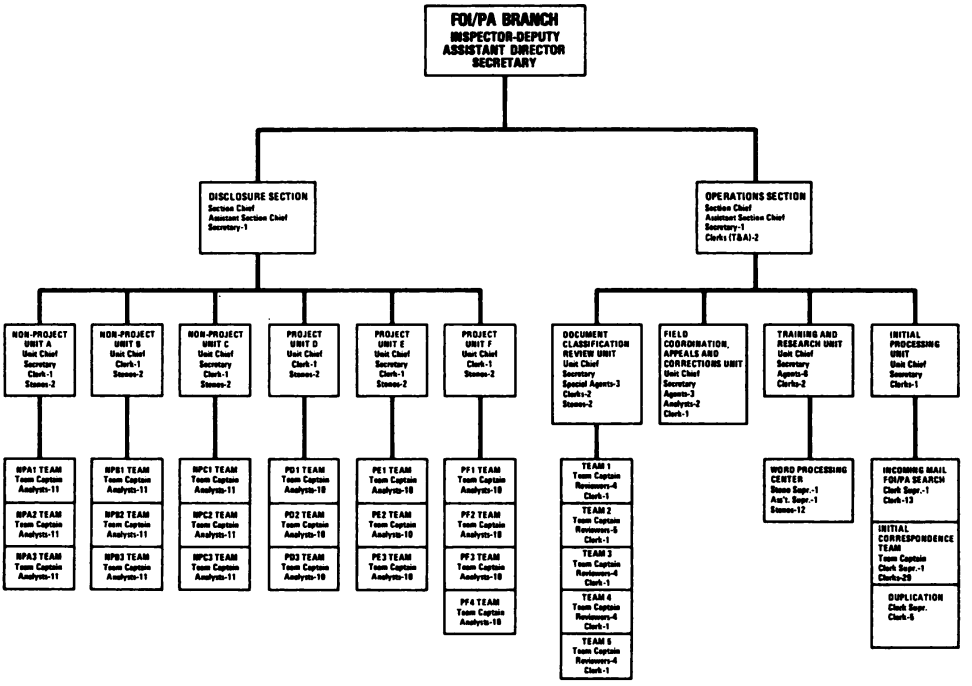
often unrealistic time requirement of the Freedom of Information Act as it applies to the FBI. We would now like to summarize the findings, conclusions, and recommendations contained in our report.

The Freedom of Information Act and Privacy Act requests submitted to the FBI were initially handled by a small staff and processed in a fragmented and ineffective manner. Acting on pressure from the Congress, courts, and requesters, the FBI has (1) revised its organizational structure for processing requests, and (2) significantly increased the resources devoted to this effort.

The FBI organizational structure is enclosed in attachment I of this statement. With your permission, I request that it be put in the record.

Mr. PREYER. Without objection, it will be made a part of the record at this point.

[The material follows:]



Mr. LOWE. In fiscal year 1977, the FBI spent $6.4 million and used up to 365 full-time people to process requests. In addition, during a 5-month period, the FBI assigned 282 special agents and expended about $2.8 million to supplement its efforts. These efforts enabled the FBI to handle the workload increase in a more efficient and effective manner.

The FBI's ability to process requests in a timely manner is affected by the sensitivity and complexity of its files. There is a misconception that the processing of requests is very simple because it only involves reviewing a requester's file to excise the names of third parties.

It is far from simple for the FBI because it's records are not in dossier form. Thus, analysts must review many documents, often from different files. These files may contain information on the requester and other individuals. The analysts must make decisions as to

what information can be released without violating someone's privacy, disclosing a source's identity, or hindering future investigative capabilities.

The FBI's ability to process requests in a timely manner is also affected by requester lawsuits—because of the FBI's failure to meet the statutory time limit or displeasure with the documents released—which result in court-imposed response deadlines. Several such deadlines have affected the general processing of requests, the most notable of which involved the *Rosenberg* case. The primary processing of this case took place between August and November 1975 because of the court's deadline. The FBI used 73 full-time and 21 part-time employees to process this one request. These people represented over half the personnel then assigned to the branch. The diversion of these resources was the major reason for the rapid increase in the backlog at that time. The backlog rose by 2,000 requests during this 3-month period.

Recently, a U.S. district court, hearing an appeal from relatives in this case, ordered the FBI to review records from 10 field offices at the rate of 40,000 pages per month and provide disclosures on a monthly basis. To meet this mandate, the FBI has assigned over 70 headquarters employees on a full-time basis and implemented a 6-day workweek so as to complete the project in approximately 8 to 11 months. As in 1975, the diversion of these people to work on one request will very likely aggravate the backlog problem.

In May 1977, the FBI initiated a project referred to as Project Onslaught. The main purpose of this project was to enable the Bureau to eliminate its backlog of requests within 1 year. The project, which cost the Bureau about $2.8 million, involved use of as many as 282 special agents during a 5-month period. This is in addition to its regular complement. The project was not successful in eliminating the backlog; however, it did reduce it from 7,566 requests in May 1977 to 4,910 requests in September 1977.

During the last 3 years, the FBI has made a number of changes in its processing of Freedom of Information and Privacy Acts requests. Since the passage of the 1974 Freedom of Information Act amendments, the FBI has expanded the types and amounts of information it releases to the public. However, inconsistencies still exist in applying the acts' exemptions. These inconsistencies have resulted because the disclosure provisions and exemptions of the Freedom of Information and Privacy Acts contain general language, thus leaving many areas subject to interpretation.

As a result, uniform implementation of the laws and unanimity of opinion as to whether a release is appropriate are unlikely to be achieved. During our review we found disagreements regarding the releasability of specific information among FBI officials, Department officials, and among judges on litigated requests.

FBI personnel use the language of the two acts, Department of Justice guidelines, court decisions, and guidance in the agency's own manual, as criteria to process information requests and determine what is to be released or withheld. In early years, the FBI processed requests with the attitude that it should withhold as much information as possible. This stands in contrast to the current approach of withholding only that information which can be reasonably expected to damage effective law enforcement.

To ascertain the appropriateness of the FBI's use of Freedom of Information Act and Privacy Act exemptions, we randomly selected 34 cases processed during the period July 1975 through August 1975. A listing of exemptions available and those used in the 34 cases is contained in attachment II. With your permission, I would like to have that inserted in the record.

Mr. PREYER. Without objection, it is ordered that that be inserted in the record.

[The material follows:]

EXEMPTIONS AVAILABLE AND THOSE USED IN THE 34 CASES SAMPLED

Exemption Freedom of Information Act	Number of cases
(b)(1) - Classified documents concerning national defense and foreign policy	10
(b)(2) - Internal personnel rules and regulations	23
(b)(3) - Information exempt under other laws	Not used
(b)(4) - Confidential business information	Not used
(b)(5) - Internal communications	13
(b)(6) - Protection of privacy	2
(b)(7)(A) - Investigatory records, interfering with enforcements proceedings	2
(b)(7)(B) - Investigatory records, deprive a person of a right to a fair trial	1
(b)(7)(C) - Investigatory records, unwarranted invasion of privacy	27
(b)(7)(D) - Investigatory records, disclosing the identity of a confidential source	27
(b)(7)(E) - Investigatory records, disclosing investigative techniques and procedures	13
(b)(7)(F) - Investigatory records, endanger the life or physical safety of law enforcement personnel	8
(b)(8) - Information concerning financial institutions	Not used
(b)(9) - Information concerning wills	Not used

Privacy Act

(j)(2) - Files maintained by Federal criminal law enforcement agencies	Not used
(k)(1) - Classified documents concerning national defense and foreign policy	1
(k)(2) - Investigatory material compiled for law enforcement purposes	Not used
(k)(3) - Secret Service intelligence files	Not used
(k)(4) - Files used solely for statistical purposes	Not used
(k)(5) - Investigatory material used in making decisions concerning Federal employment, military service, Federal contracts, and security clearances	6
(k)(6) - Testing or examination material used solely for employment purposes	Not used
(k)(7) - Evaluation material used in making decisions regarding promotions in the armed services	Not used

Mr. LOWE. Generally, we found that between 1975 and 1977 there was a substantial improvement in the amount and type of information released. I should note that we still disagree with how some of the exemptions were used and believe that in several cases additional information could have been released. On the other hand, if other individuals look at the same cases, they might disagree with us.

I will now discuss three exemptions which cause the FBI problems in determining what and how much information to release. These are (b)(7)(A), (b)(7)(C), and (b)(7)(D).

The (b)(7)(A) exemption is used to withhold information which, if released, would interfere with a pending investigation. In our sample of 34 cases, the FBI cited this exemption in two cases. In one case the exemption was used, in our view, inappropriately, because all information was withheld without an attempt to identify any releasable part of it. The FBI, however, faces difficulties in applying this exemption—both when the requester knows about the active investigation and when he or she is unaware of it.

In the first situation, the FBI is tasked with reviewing the files, segregating information, and releasing that which would not interfere with the pending case. This is a time-consuming and costly process which usually nets the requester only information which is in the public domain and/or already known to him or her.

In the second situation, if the FBI cites the exemption, it would in essence be telling the requester that an investigation is underway. Thus, the FBI faces a dilemma. It cannot truthfully say there is no record nor can it choose to ignore the request. The very existence of a backlog of requests helped to solve the problem because the processing delays served to conceal investigations until the Government was ready to apprehend or indict the individuals involved.

The (b)(7)(C) exemption allows the withholding of information which, if released, would constitute an unwarranted invasion of another individual's privacy. The FBI used this exemption in 27 of the 34 sampled cases. In many of these cases, additional information could probably have been released without unwarrantedly invading the personal privacy of another individual. It should be noted, however, that in six of the more recent cases the FBI released material of a nature that would have previously been withheld. The additional releases were made because of the more liberal policies established by the Department of Justice in May 1977.

When applying the (b)(7)(C) exemption, the issue facing officials of law enforcement agencies is determining what constitutes an "unwarranted invasion" of privacy. This concept has never been clearly defined; therefore, subjective judgments will continue to be made and inconsistent applications of the exemption will occur.

The (b)(7)(D) exemption allows the withholding of information which, if revealed, would disclose the identity of confidential sources. The FBI uses this exemption to generally withhold the identity of and information provided by informants, local police departments, credit bureaus, other commercial organizations, and foreign law enforcement agencies. The FBI used this exemption in 27 of the 34 sampled cases. In the past, this exemption was used to withhold some information which, in our opinion, could have been segregated and released. However, there have also been recent improvements here.

For cases processed in 1977, the FBI was using this exemption more appropriately, and requesters were receiving additional information. The problem with this exemption is that, in the last analysis, it rests on speculation as to how much of the information can be released without disclosing a source's identity.

Although the FBI has substantially improved its operations under the Freedom of Information and Privacy Acts, additional management and legislative actions are needed. Neither the Freedom of Information Act nor the Privacy Act provides sufficient guidance on what information can be released because disclosure provisions and exemptions are stated in general terms. Therefore, subjective judgments result which allow wide disparity in agency and individual decisions on what information can be released. Thus, effective implementation of the acts by the FBI is hindered by definitional uncertainties concerning the following questions: What constitutes an "unwarranted" invasion of privacy? What is a confidential source? What information should be provided on pending investigations?

To minimize inconsistencies in Freedom of Information and Privacy Acts implementation, we have recommended that the Attorney General require the Department's Office of Privacy and Information Appeals to: Distribute the substance of its decisions to all Justice Department components so that they can be used as guidance in future cases, update its guidelines and distribute them to all Department components, and randomly check initial releases made by the FBI to improve the consistency and quality of that agency's releases.

To otherwise improve the processing of responses, we have recommended that the Attorney General require the FBI to reduce the drain on its investigative resources by—to the extent possible—making greater use of analysts instead of special agents to supervise the processing of requests; and requiring the FBI and other Department components to be more responsive to requesters by providing additional information on such items as the number of pages in a file, number denied, and by noting on each document the exemptions used to withhold information.

The FBI is faced with the dilemma that, even after a substantial commitment of resources and improvement of its organization and processing, it still cannot meet the often unrealistic 10-day time limit imposed by the Freedom of Information Act. Therefore, we are recommending that the Congress change the act's time requirement as it applies to the FBI. We believe that the law should require the FBI, if unable to fully respond, to at least acknowledge the initial request within 10 working days and provide a full response within an additional 30 working days. In situations, however, where such a timeframe is unreasonable in view of the quantity of material to be reviewed, the FBI should provide the requester with a firm fixed date for delivery of its response. If the requester considers this date unreasonable, he could then bring suit to compel an earlier delivery.

In reaching decisions on such suits it would seem reasonable that the courts give consideration to the possible adverse impact of a directed earlier response on the FBI's ability to service the demands of other requesters, premised on a finding that the FBI is devoting a reasonable level of resources to these activities.

By changing the 10-day requirement the courts will be relieved from handling numerous actions resulting from the FBI's inability to respond within 10 working days. We believe this is a desirable alternative to significantly increasing the number of people working in the Freedom of Information and Privacy Act area, while still maintaining a reasonable degree of responsiveness to requesters.

Mr. Chairman and members of the subcommittee, this concludes our statement. We will be happy to respond to any questions you have.

Mr. PREYER. Thank you, Mr. Lowe, for a very fine statement. We congratulate you and your associates on the report which you have filed in this area. I think it makes very clear the complexities and sometimes the cost of living in a free and open society.

Mr. Kostmayer?

Mr. KOSTMAYER. I have no questions at this time.

Mr. PREYER. Mr. Weiss?

Mr. WEISS. In citing the various exemptions which were utilized, you indicate that 1 of the exemptions was used 26 times and another was used 27 times. We are talking about the same 34 cases; is that right?

Mr. LOWE. That is right.

Mr. WEISS. What you really have is this. In those 34 cases usually more than one of the exemptions was cited. Is that right? In what percentage of the cases were all 3 exemptions cited?

Mr. LOWE. There are about nine exemptions as I recall.

Mr. WEISS. No; I am talking about the three.

Mr. CORTINA. In a majority of the cases the most popular exemptions are (b)(2), (b)(7)(C), and (b)(7)(D).

Mr. WEISS. Is my impression correct that in fact in most of those 34 cases, all 3 of those exemptions were cited?

Mr. CORTINA. That is correct. They would be cited numerous times.

Mr. WEISS. Suppose the 30-day period which you recommend were in effect now instead of the present 10-day period. What proportion of the backlog do you think would be met within the timeframe?

Mr. LOWE. I think a very large proportion of the outstanding backlog would be met within a 30-day time limit except for the very large cases that the FBI gets in, such as the *Rosenberg* case or the *Alger Hiss* case. Those are impossible to do in 30 days. The large majority of requests should reasonably be met in about 30 days after acknowledgment.

I believe that you have to think of this as sort of a factory-type operation. There necessarily has to be some backlog so that you don't have people sitting around waiting for work to do. You ought to be able to balance out the work load if you have enough time to process these requests on a reasonable basis.

Mr. OLS. Out of the 272 cases that we analyzed to come up with the processing time, roughly 75 percent of those, based on the computations, could be processed within 40 days—the 10 days plus the other 30.

We have come up with a figure of 75 percent that could be processed within that time limit.

Mr. WEISS. When was your study actually conducted and when was it completed?

Mr. OLS. It was started in September 1976 and completed in November 1977.

Mr. WEISS. You can only really go on the basis of what the situation was at that point; you have had no updating since then?

Mr. OLS. Not since November.

Mr. WEISS. All right.

Mr. LOWE. We did, of course, just receive the comments by the Justice Department and the FBI on our draft report. They would have updated any situation that has changed at that time; essentially the situation is the same as it was.

Starting in May 1977 the Justice Department substantially changed its stance on what should be released and what should not be released. Since that time the FBI has released a lot more information than they ever have in the past. I think it has been a gradual kind of a thing. Initially there was a great reluctance, now even if there is some underlying reluctance they are following the rules, as far as we can see, and the rules have been substantially liberalized by the Department. This is not just for the FBI but for all Government agencies.

Mr. WEISS. I am at a loss to understand the conclusion regarding their backlog and their capacity to respond in 30 or 40 days.

I had occasion to send a personal request to the FBI in early November. I finally got an acknowledgment from them in January saying that they had located the papers and I would soon have them. More than 60 days has passed—much more than 60 days—and still I have no response. I would think that in this instance they would at least be aware of the fact that they have had that open request pending for quite a long time.

So, I question whether those who have come from the field are in fact, completing the work as expeditiously as would seem possible. I just wonder if the 30-day period itself is realistic and whether, in fact, the open-ended suggestion to give them the opportunity to ask for more time would not really give them a carte blanche to do that in any case where they decided they would like to take more time for whatever reasons.

Mr. OLS. The figure that we came up with of 40 days would have to be taken in light of reducing that backlog down. Naturally if you are at the end of the line of a 4,000 backlog, you will never get a response in that 40-day limit.

You would have to say that we are down to point zero and now we can process these papers within the 40-day time limit. We feel that, based on improvements, they could move that request through the system within the time limit. That is what our recommendations are geared to.

Mr. LOWE. On the larger cases they would have to say they could not process those in the 40-day time limit—the 10 days for acknowledgment and the 30 days. They expend a lot of manpower on some of the larger cases and the files are certainly very voluminous.

I would think that in the average case, if they knew they had the 40 days to operate in, they could staff to take care of that except for these big humps such as the *Rosenberg* case and the *Hiss* case and some of those. I would assume that some of these big cases will be out of the way one of these days.

Mr. WEISS. Are there sanctions that you would suggest? How do we deal with the constant failure?

Supposing we were to amend the legislation but then find later that the same situation still prevails; what do we do then?

Mr. LOWE. The requester still would have the right to go to court if they did not meet the 40-day deadline.

Mr. WEISS. That would be the individual applicant?

Mr. LOWE. Yes. In fact, this is what he does now.

Mr. WEISS. But isn't that throwing the burden on the wrong party? Should there not be some kind of governmental sanction, perhaps by way of a government ombudsman operation, so that it is not an additional burden, financial or otherwise, on the applicant's part to force the FBI to do that which the law says they ought to be doing?

Mr. LOWE. The applicant can, in certain cases if he wins his case, also win the attorney fee. He has that going for him.

I believe that there would not be that many situations where they could not meet this thing within the 40-day period. That would certainly be for an unusual type of case unless all of a sudden you were deluged with thousands of requests for some particular item. They ought to be able to space out the normal workload in that length of time. I think they could engineer that pretty well.

The requester would still have the same remedy that he has now.

Mr. CORTINA. Another problem is this. Early this year the Rosenberg files maintained by 10 field offices had to be processed and this has taken over 50-some analysts from the regular processing. There is also some material being processed for the Assassination Committee. Therefore, the complement of the branch is not at full strength at the moment.

Mr. WEISS. Do you think there ought to be personnel from the various departments of the Federal Government who could be made available to cover that kind of contingency? It seems to me that we are not really doing very much to remedy a problem if the solution works "only if we don't get overloaded."

It seems to me that if we designate this remedy as national policy, it ought to be a workable remedy. In fact, if the system falls apart when there is a glut at any particular time, then you don't really have a remedy.

Mr. LOWE. I think in the *Rosenberg* case, part of the problem—aside from the volume of work—is that the court in effect moves that group of requests to the front of the line. That causes some problems.

On page 26 of our report, we pointed out that in June 1977 the staff dealing with these problems was larger than 51 out of 59 FBI field offices. It was also larger than 6 of the other 11 divisions in headquarters. There were a substantial number of people assigned to the work. I think that they have made an effort to reduce that backlog.

They have taken a couple of lumps here recently and the backlog may go up until they get this other Rosenberg work out of the way.

But with a 40-day time schedule you can engineer that pretty well. When you are talking about 10 days it is almost hopeless.

It would be helpful and the requester will still have the same remedies that he has always had under the law—he can go to court if he does not think he is getting a reasonable response.

Mr. WEISS. Going back to Mr. Ols' comment—when would the expectation of a 40-day period start? When you have cleared up the backlog? When do you project that this will happen?

Mr. OLS. That is what we are saying—I don't know if they are ever going to totally reduce the backlog unless you have another Project Onslaught or some other means of reducing that down considerably. What our time limit is based on is an ideal situation. If

you have a Rosenberg or a Hiss case or any of the other major cases, the FBI will never be able to meet the 40 days. They probably won't be able to meet the request in 6 months.

With the example of your letter, they can't do it; they don't have enough people unless they double their staff.

Mr. WEISS. Right.

Therefore—and I don't want to belabor this point—does it make any sense to start thinking about using a different kind of operation. Perhaps it is unfair to have the FBI itself charged with the personnel. They give the impression that they can solve the problem by putting all these additional people on their payroll, when in fact what may be required is an administrative review kind of mechanism if we are serious about providing a remedy.

I don't think it suffices to say that last year we had the *Rosenberg* case and this year we have the *Hiss* case and next year we will have the *King* case and the year after that we will have the *Kennedy* case and so on. You can always have at least one major case which will gum up the works. That means that the average citizen who is trying to get information in his own situation will always be at the back of the line.

Mr. LOWE. I think most of those major cases will be out of the way fairly soon. There was sort of a backlog of cases and when the whistle blew they got all these requests dealing with those. I think probably those will be out of the way one of these days. I don't know how many more major cases you can have. You would have to have them one at a time.

The FBI has made a fairly reasonable effort here and put a lot of manpower into this thing. We have recommended in our report that they try to use more analysts and less law-trained agents. They seem to think that may not be entirely practical but I am sure they will if they can. It would be a lot less expensive and they would be able to put the rest of their people back to what they should be doing.

They feel very strongly though that some of these records have to be reviewed by people who are familiar with the investigative techniques in dealing with informants and that sort of thing.

I don't know whether you can ever get that backlog down to zero. I don't think you would every want it down to zero so you can have some sort of a routine processing operation. But I think they can staff it up sufficiently to meet a 40-day deadline.

It seems to me reasonable to expect that some of these cases that have happened in the past—the *King* case, and the *Hiss* case and all of those—will eventually be cleared up.

Mr. WEISS. You're more of an optimist than I am.

Mr. LOWE. Maybe.

Mr. WEISS. Mr. Chairman, I feel that I have taken enough time.

Mr. PREYER. Along the line that Mr. Weiss was pursuing, you indicated that, with a 40-day deadline, the Bureau would be able to keep current with requests. As to the backlog that now exists, do you recommend that that be reduced on a crash basis by continuing Project Onslaught or something of that sort, or do you think gradual attrition will take care of it?

Mr. LOWE. I don't see any great need for another attack on the thing like Project Onslaught. You will probably need to add a few additional people until that backlog is cut down.

As I recall, they just recently analyzed the backlog of cases that are actually in the pipeline on which there had been no action thus far. It seems that there were about 1,000 cases, I believe, out of that 4,000. In some of the other cases they are waiting for a response from the requester. They may be waiting for him to send in his fee for reproduction or a notarized signature.

The backlog of cases that ought to be worked on today comes out to slightly more than 1,000 out of about 4,900 in the backlog. I think another Project Onslaught is probably not necessary at this time, unless they get some other heavy requests for some major cases.

Mr. PREYER. So that is partially a result of a redefinition of what constitutes a pending case?

Mr. LOWE. Yes, it is a clarification of what they have in their backlog.

Mr. PREYER. You mentioned the cost of Project Onslaught. Are there any other less costly means by which the backlog can be reduced? You did talk about using analysts to a greater degree. Do you have any other suggestions along that line?

Mr. LOWE. John, do you have any ideas?

Mr. OLS. I think the only way you could do it is to assign more people, maybe not quite the number that we talked about of 282 agents. But you are going to have to get more people if you want to get that down to a 30-day backlog.

Mr. PREYER. Do you have some horseback opinions about that number, rather than assigning 282 investigative agents? What proportion of that could be analysts and free up more investigative agents for investigation?

Mr. OLS. I would probably recommend at least 90 percent analysts and 10 percent agents just for a supervisory level to look over what the analyst has looked at. The analyst knows the law and knows the exemptions, but the agent would be in a much better position to decide whether or not it is an unwarranted invasion of privacy or would disclose a confidential source.

Mr. PREYER. A relatively small number of agents would be needed?

Mr. OLS. Yes.

Mr. LOWE. I think when Project Onslaught was undertaken, the only source of manpower they had was agents at that time. You have to get these analysts in and train them before you can turn them to the work. In fact, the agents had to have some training, too, before they went to work in this particular operation. But with their legal backgound and their knowledge of the FBI, they were able to step in much quicker and go to work.

Now, with a fairly sizable pool of analysts, that could be expanded much more easily, I think, in a fairly short period of time.

Mr. PREYER. In your report you recommend that the requester should be given more information about the nature of the material that has been denied him and about which files have and have not been checked. You made some suggestions in your statement on that.

If you have any further language or checklists which you would suggest that the Bureau use to convey that information, we would be pleased to have it for the record.

Mr. LOWE. We can work on something like that, Mr. Chairman. We will get you something for the record. I think it will probably involve quite a laundry list of items. We will see what we can do.

[The information follows:]

INFORMATION THAT SHOULD BE INCLUDED IN FBI'S RESPONSE LETTER TO A REQUESTER

1. The number of pages in an individual's file.
2. The number of pages denied entirely and a summary of the exemptions used for these pages.
3. For pages released with excised information, the exemption used for each excision should be identified.
4. The requester should be told which systems of record were searched.

Mr. PREYER. You mention several suggestions in your statement. You also state in your report on page 46 that in 345 out of 603 cases, the Department's Appeals Unit released information which the Bureau had withheld. Could you give us any information on how extensive these reversals were? Did it just involve releasing a name or two, or does that rather high percentage of reversed cases—about 50 percent—involve some wholesale release of material?

Mr. LOWE. I would like to have Ruben answer that one if he will because he has seen these cases.

Mr. CORTINA. We don't have the exact figures on how much of the material was overturned in terms of whether it was names or wholesale release. I would say that in a majority of the cases it was not wholesale; very few cases would involve wholesale release of material.

It involved mostly names, paragraphs, parts of paragraphs, parts of pages, For instance, with a three-volume case of maybe 600 pages, 16 to 20 pages altogether would be released, maybe 6 or 7 depending on the case.

Mr. PREYER. Have there been any cases where the Department has told the Bureau that some of the material should not have been released?

Mr. CORTINA. I didn't see any cases. However, I saw one case in which the FBI proposed a release, and the appeals attorney said they should not.

Mr. PREYER. The general tone of your comments is that the release policies of the Appeals Unit has become more liberal. Are there any specific instances in which the Department has issued guidelines or policy statements which have narrowed a particular class of material that can be withheld?

Mr. CORTINA. Not to my knowledge.

Mr. PREYER. You also point out that the Appeals Unit and the Litigation Unit ought to be more fully staffed. Do you have recommendations on how much additional staff would be desirable and how much additional cost might be involved?

Mr. LOWE. This is a horseback opinion, Mr. Chairman, something in the neighborhood of 5 additional in the Appeals Unit and 10 in the litigation area. The horseback opinion of the cost of that would probably be $300,000 or $400,000 a year.

In commenting on our report, they didn't necessarily agree with the position that they should beef that up. But we still think it might be a good thing if both those units were beefed up a little bit. They do have a backlog in both of them.

Mr. PREYER. You also mention in your report that the Bureau won't release information concerning illegal intelligence techniques involving a foreign establishment. How broad is the definition of "foreign establishment"? Does it mean an embassy, or does it go all the way to including a resident alien?

Mr. CORTINA. In all the cases that I looked at, it was only related to a foreign embassy.

Mr. PREYER. If an agent or analyst, in the course of reviewing material for an information request, finds some information which he thinks discloses some illegal or improper activity by Bureau personnel or other Government employees, is that reported to the FBI's or the Justice Department's Office of Professional Responsibility? Did you run into anything of that sort?

Mr. LOWE. Last year we did testify here on a study we had done about the Department's and FBI's professional responsibility operation. Under the rules anybody who runs across anything like that should report it—that is an obligation they have. Whether or not we actually saw any cases to that effect, I don't know.

Mr. PREYER. You didn't see any cases?

Mr. CORTINA. No.

Mr. PREYER. You raise the question about what constitutes an unwarranted invasion of privacy, what constitutes a confidential source, and what information should be provided in pending investigations. Those are tough areas to draw up definitions, I realize.

What are your views as to what definitions or what guidelines might be drawn up in any of those three areas?

Mr. LOWE. I am not sure it is possible to draw a tight definition in any of those areas. Every one of them depends on a judgmental matter. It seems to me that the thing you want most of all is some sort of consistency throughout the Government, and particularly throughout the Justice Department, in that area.

I guess an old saw is that it depends on where you sit. If it deals with me that is an invasion of privacy; if it deals with the other guy it isn't.

I don't think you can spell those things out in the law certainly. They will probably have to be spelled out eventually in court decisions which will serve to set the limits in these areas. I guess as cases are developed through the courts this will happen. I think the need for somebody to try to get some consistency throughout the Federal Government on all of this is necessary.

Mr. PREYER. You don't recommend that we attempt to make those general terms more specific in the Freedom of Information Act legislation?

Mr. LOWE. I don't think you could make them that specific but it does present a problem obviously to everybody dealing with this act.

Mr. PREYER. You say in your report that only 4 out of nearly 900 pending lawsuits against the Government were conceded as a result of the Attorney General's May 1977 memorandum, which told agencies the Justice Department would take a harder look before defending agencies against FOI lawsuits. That isn't very many—one-half of 5 percent—of the pending cases.

Does that mean the memo has not had much of an impact?

Mr. OLS. I wouldn't go as far as to say that, Mr. Chairman. The impact has been a ripple effect. Because of that policy the agencies, as well as the FBI, are releasing more information and being more liberal because they know that the Attorney General will not defend those cases. Even if it is allowable to withhold certain information, if they determine that it can be released without being harmful to techniques or sources they will release it. Even though a few cases were totally wiped out, that is the impact that we see.

Mr. PREYER. You see a general liberalizing of the release of information that came about as a result of that memo?

Mr. OLS. Yes.

Mr. PREYER. The Comptroller General, Mr. Staats, sent a letter to us on March 29 which discussed the problem of GAO access to Bureau files, He stated that the GAO believes it has a right to full access but has not been able to get full access. He also says in that letter that he does not favor any legislation to clarify the right of access.

How do you plan to achieve full access?

Mr. LOWE. I guess we will just have to keep plugging away, Mr. Chairman, I think we have gotten a lot of support from this committee certainly and from the Judiciary Committee.

This whole operation has to do—to some extent at least—with a matter of confidence that the FBI has in GAO as far as our release of information. I think that in working with them over the past several years this situation has eased. There are still problems in this particular case. It costs us more and it takes more time and it certainly costs the FBI more to operate under the rules that we have agreed to here.

I don't see any way to approach it that is really going to change too much.

I would like to cite one example in my career here. I was in charge of our work in the foreign aid program for about 4 or 5 years and the law there is very specific because of a lot of problems that we have had in past years. The law at that time said that if the Comptroller General demanded a document in writing and he did not receive it within 35 days, then the funds for that program or project or whatever were cut off.

That's real good but when you have six guys in Brazil trying to get a piece of information, it's a tough game. Although the agency head and the agency rules said that they were going to comply with that law, it is still tough duty. You have to reach back in a bag of tricks once in awhile. But that doesn't guarantee that you are going to get everything you are going to need either.

Mr. PREYER. The gradual growth of enlightenment rather than legislation is the approach.

What if Congress sent you a request to conduct a review of the management of the FBI informant program; how would you proceed in that situation?

Mr. LOWE. You mean before I fainted or after I fainted, Mr. Chairman? [Laughter.]

That is probably one of the most sensitive areas in the FBI operation or any law enforcement operation. I think I would almost be afraid to know some of those things myself. I don't know how we would proceed on that.

The FBI would probably be most reluctant to give us information on informants. Not only from the standpoint of letting the world at large know that we had had access to that information, but from them fear that something might get leaked out and one of those informants might get bumped off or something.

It is a legitimate concern on their part and I don't really know the answer for that.

Mr. PREYER. That is a good, honest answer.

Mr. Kostmayer?

Mr. KOSTMAYER. What is the current backlog of cases?
Mr. OLS. It is around 5,000.
Mr. CORTINA. 4,921.
Mr. KOSTMAYER. That is as of November 1977?
Mr. CORTINA. That is updated as of March 31.
Mr. KOSTMAYER. March 31 of this year.
Generally, is it possible to say how long those cases have been pending?
Mr. CORTINA. Not exactly, I don't have that figure. I could try to get it for you.
Mr. KOSTMAYER. Is there any kind of average such as half of them pending for a certain period of time?
Mr. CORTINA. I do not have that answer.
Mr. LOWE. The only thing that we could come close to is the sample that we took of the 272 cases.
Mr. CORTINA. Approximately 75 percent of those would have been processed within the 40 days. The nonproject cases currently being assigned for processing were received in January 1978, whereas project cases being assigned date back to October 1977.
Mr. KOSTMAYER. Project cases are major cases such as the *Rosenberg* case?
Mr. CORTINA. Correct.
Mr. KOSTMAYER. If I could get some more specific information on that, I would like to have it.
Did you find in your survey that there were instances of unreasonable delays?
[The material follows:]

AGE OF PERFECTED REQUESTS IN THE BACKLOG AS OF MAR. 31, 1978[1]

Age of requests since perfected	Total being processed	Percent of total
Less than 30 days	470	17
30 to 90 days	736	26
Over 90 days	1,592	57
Total	[2] 2,798	

[1] Perfected requests are those where the FBI has enough identifying information and the notarized signature necessary to enable it to process the requests.
[2] The total backlog as of Mar. 31, 1978, was 5,369. The FBI did not maintain data by age of receipt for the remaining 2,571 requests. These requests were broken down as follows: Awaiting a response from the requester, 1,600; newly received, 700; and waiting to be closed for various reasons, such as awaiting fees from a requester, 271.

Mr. CORTINA. No; I did not.
Mr. KOSTMAYER. No instances whatsoever?
Mr. CORTINA. No.
Mr. LOWE. It is just volume more than anything else.
Mr. CORTINA. Sometimes it might be because they could not find the file immediately or other reasons.
Mr. KOSTMAYER. Did the Bureau actually increase its staff or did they simply shift people around, or both, to handle these?
Mr. CORTINA. They basically shifted staff.
Mr. KOSTMAYER. So there were no major additional hirings?
Mr. CORTINA. Correct. The people who came to the FOI branch are from other divisions.
Mr. KOSTMAYER. Did you have a chance to look at the *Rosenberg* case at all?

Mr. CORTINA. No; I did not. There is too much material; I would still be there.

Mr. KOSTMAYER. What if an individual asks the FBI for a file and the FBI indicates—as I guess they did in a number of your cases—that there is no file. In what way does a person have to verify that; in what way did you verify those 56 so-called "no record cases"?

Mr. CORTINA. We did not have access to the index cards so we don't know whether they missed it or did not. Basically you have to go on the honesty that they searched for it and they did not find it.

Mr. KOSTMAYER. You have to rely on the honesty of the FBI?

Mr. CORTINA. Correct. We did not have access to the index cards.

Mr. OLS. That would be the only way you would know if, in fact, the request came in from the individual and they did or did not have records. You would have to go to the central index to find out if there was a file and whether or not they responded accordingly.

Mr. KOSTMAYER. Is it possible to conduct a search of those 56 cases?

Mr. OLS. I am sure we could discuss that with the FBI and in those 56 cases I am sure that arrangements could be worked out. We would have to work within the agreement that we signed last May.

Mr. KOSTMAYER. That would be my second request then.

Is there some FBI information which is not retrievable; through the Bureau's central records or not published anywhere else, is that possible?

[The material follows:]

VERIFICATION OF FBI RESPONSE ON NO-RECORD CASES

GAO's verification of the 56 no-record cases, included in its sample of 196 requests, showed the FBI properly searched its records in all but one case, as follows:

--In thirty-seven cases the FBI had no record on the requester, and the FBI responded properly to the requester;

--In seventeen cases the FBI properly determined that the requester had not been the subject of an investigation by the FBI. It properly stated in its response to the requester:

> "If, however, you feel that you actually were the subject of investigative interest by the FBI, we will search our files further upon identification of the incident or relationship concerning which you feel your name was recorded by us."

--In one case the FBI responded that it did not have a file on the individual. However, GAO's verification indicated the possibility of a file on the requester. During the original processing, the FBI asked the requester to provide additional identifying information so the FBI could assure itself that the requester was the subject of the file. The requester refused to provide additional information to the FBI; therefore, the FBI could not assure itself that the requester was the subject of the file, and in light of a possible invasion of privacy, could not release any information to the requester. The FBI told the requester:

> "Based on the information furnished by you, we are unable to locate any record which is identifiable with you."

GAO agrees with the FBI's decision in this case.

--In one case the FBI responded that it did not have a main file on the individual. However, GAO's verification indicated that a file does exist on the requester. Originally, the requester sent in several different versions of his name. When the initial search of the index cards was made, the searcher did not identify the existence of a file because the searcher did not look for a file under all possible combinations of the requester's name(s). GAO believes this was merely a human error, not a deliberate attempt to hide the existence of a file. As a result of this verification, FBI officials told GAO that they would be contacting the requester immediately to ask for his notarized signature so that the file could be processed.

Mr. OLS. There is information that would not be retrievable through the central record system. The report we issued to Chairman Preyer in December talks to that issue on the indexes. There is field office information that is maintained that is not in the central record system but that would be a very small percentage. I would say that it would be less than 2 percent of the material. Everything else would be available through the central record system.

Mr. KOSTMAYER. Why is that, simply because of the archaic filing system?

Mr. OLS. It may be many cases that may have started under domestic security for example; the field initiated a case but it was never pursued any further or never became a full field study. Therefore, the records would just be maintained in the field office; they would never appear in the central record system.

Mr. KOSTMAYER. You said it would be about 2 percent?

Mr. OLS. That is an off-the-top-of-my-head statement.

Mr. KOSTMAYER. These would be cases of domestic security?

Mr. OLS. That is one that I know of for a fact.

Mr. LOWE. I think this came about not necessarily as a result of our review of the domestic intelligence but as part of a whole change in the way that program operated. A preliminary investigation—if I recall the correct words—can be initiated by one of their offices and, as I recall, can only run for 30 or 90 days. At the end of that period of time it comes into the FBI headquarters for further authorization to continue. In cases where something didn't pan out it just never comes in.

Mr. KOSTMAYER. It stays in the district office or the field office?

Mr. LOWE. Yes.

Mr. KOSTMAYER. When a person writes to the FBI asking for this information, would he receive that information?

Mr. CORTINA. If he wrote to the field office he would get it.

Mr. KOSTMAYER. What if he didn't know enough to write to the field office?

Mr. CORTINA. If he wrote to headquarters and he only asked for one field office, the FBI would do it. If he asked for two field offices, the FBI would go ahead.

Mr. KOSTMAYER. What if he didn't ask for any field offices at all?

Mr. CORTINA. He would only get information from the Bureau headquarters.

Mr. KOSTMAYER. It is possible that preliminary investigations could be conducted on citizens in field offices lasting up to 3 months which the citizen would not be aware of because the central office does not have the information.

Mr. CORTINA. If he only wrote to the headquarters, yes.

Mr. KOSTMAYER. Is there any effort to correct that; do you think that that should be corrected?

Mr. OLS. Our feeling is that the FBI should respond to the requester and tell them that they did not check with the field offices.

Mr. KOSTMAYER. Is that what they say when they respond?

Mr. OLS. No; they do not. That is one of our conclusions in the report.

Mr. KOSTMAYER. So you recommend that they inform the individual that no field offices have been contacted?

Mr. OLS. That is right.

Mr. LOWE. However, we also believe—and this is in our report—that the vast majority of information that they have in the FBI would be turned up through the central record system.

They do have a very efficient filing system.

Mr. KOSTMAYER. Is there some possibility of getting the FBI—maybe you are not the people to ask—to have all of that information available in their central filing system so that all of it is available?

Mr. LOWE. I don't think that would be quite possible. It would probably be quite a tremendous burden considering how much information is in the central record system.

Mr. KOSTMAYER. It's only an additional 2 percent. It wasn't tremendous when we didn't have it, now that we have it, it is tremendous.

Mr. LOWE. Considering what you would have to do to find out about it and get it in here if would probably be a lot of work.

Mr. KOSTMAYER. Thank you, Mr. Chairman.

Mr. PREYER. Mr. Weiss?

Mr. WEISS. If I can pick up just at that point in the area of electronic surveillance. As you know, in order for there to be such surveillance at the local field level, there has to be a request from the local U.S. attorney to the Assistant Attorney General or the Attorney General himself for direct authorization. That goes back on down. It is only when that authorization is given that they can proceed with surveillance assuming that the judge grants the request; right?

In those instances I assume that, when there is that kind of authorized surveillance, the FBI would have at its central offices a record of whatever is turned up in the course of that surveillance; is that right?

Mr. OLS. Yes; to our knowledge that is the way it would work. There would more than likely be a major investigation for at least the 90 days that we are talking about before they would go to an electronic-type surveillance.

Mr. KOSTMAYER. What if it were conducted by a field office?

Mr. OLS. Ninety-eight percent of the information is available centrally whether it is out in the field or here.

Mr. KOSTMAYER. The type of investigation that Mr. Weiss was talking about could be conducted by a field office.

Mr. OLS. Yes; but it would still be in central headquarters.

Mr. CORTINA. If they went ahead and conducted an electronic surveillance it would mean that it would be a significant investigation and that information would be sent to headquarters.

Mr. KOSTMAYER. Even if it lasted less than 90 days.

Mr. CORTINA. Yes. More than likely it would not last less than 90 days.

Mr. OLS. There also is a specific index in the Federal Register that lists electronic surveillance as an index. From our understanding, that is not searched when the FBI searches the central record system. That would be another instance where we believe the FBI should tell the requester specifically what it has searched and what it has not.

But that specific information is published in the Federal Register as a system of records.

Mr. LOWE. So the requester under the rules at least would be on notice that this is a system of records that he can also ask for.

Mr. WEISS. It does not come back automatically?

Mr. OLS. No.

Mr. WEISS. If you simply ask the FBI for all the information that they had on you and you don't ask specifically for the electronic surveillance register, you don't get that information back?

Mr. OLS. They would simply search the central record system. The law does not require that they do more. We are recommending that they should.

Mr. WEISS. I appreciate that and I think it is a good suggestion.

Again, going back to the authorization process for electronic surveillance. Could we not use something similar to that authorization process for nonelectronic surveillance investigations. Although in theory you are talking about major investigations where electronic surveillance is conducted, the facts are based on results—and I am sure you are aware of this. In the majority of cases of the organized crime task force electronic surveillances, for example, the results are almost negligible.

I wonder whether, in fact, you would not also be wise to give some thought to recommendations for requiring the filing of any such investigation to be made centrally so that it would be on record someplace and not be dispersed throughout the various districts of the United States.

Mr. LOWE. I think almost anything that way would be, Mr. Weiss, centrally recorded in their file.

Maybe John and I confused you a little bit. The thing that we were talking about previously was where the field office would conduct a preliminary investigation just to see if they wanted to get full authorization for an investigation; this had to do with domestic security and not the criminal operation.

Practically all of the criminal information would be centrally recorded.

This other thing was a very minor case where, in order to start doing anything, you have to open a file. If you decide not to proceed any further after a few days or 3 weeks or whatever, that is the end of it and nothing ever comes out of it——

Mr. KOSTMAYER. Or 3 months.

Mr. LOWE. Yes. But that, too, is a vast improvement over what the system was prior to that.

Mr. WEISS. Just as a matter of proper management theory, would you not think—especially in an area as sensitive as domestic intelligence—that, even when you are talking about a preliminary investigation, the central office ought to have a record of what went on and what preliminary investigations were started? This way anybody who wants to know if they were the subject of an investigation would have access to that information without specifically having to go to perhaps seven of the nine districts in order to find out what is going on?

Mr. LOWE. I don't know, Mr. Weiss. It seems to me that the system they put in, in domestic intelligence, was a big improvement over what they had before. If there was any significance to these things they would be in the files. It is a matter of how you feel about it, I guess.

Mr. WEISS. Let me take it one step further to the area that is of great concern to the chairman as underlined by the exchange of correspondence with the Comptroller General. That is the concern

with the availability of—the access to—raw files so that you could make your own judgment as to what transpired rather than rely solely on FBI summaries and what they want you to know.

The Comptroller General suggests that legislation may do more harm than good. I think you have tended to support that position on the premise that maybe it takes away authority that you already have or raises some questions about authority you may have.

How is the Congress and especially this committee which has full oversight responsibilities—to keep abreast of what is happening within the FBI. We need to know whether, in fact, they are living up to or violating the mandates of law. If they don't provide access to necessary information to the very agency that Congress has created to do its investigating for it, how do we get around that? If you don't have any legislation, what can we do to impress the FBI with the fact that the Congress and you as an agency of Congress are entitled to do that?

We can't do our job if you can't do yours.

Mr. LOWE. I don't know the answer to that, Mr. Weiss, to be honest with you. I think you just have to persevere. The committee has to continually push the FBI to cooperate with us.

As we point out in that letter, within the confines of that treaty if that is what you could call it—they have lived up to that very well.

Each time we start a new area it does require some negotiations and it takes a while for us to get into it and to get squared away as to how we are going to work this thing out.

Mr. WEISS. That is the very concept that bothers me. The letter does indicate that every time a new area comes up you have to go through new negotiations. You almost get the idea that the FBI is a separate government rather than a bureau of the Justice Department of the United States of America.

It proves to me that perhaps one of the ways of dealing with the problem is for the GAO to be more assertive when it does not receive full cooperation and to come back to the subcommittee and say, "Listen, we have run into a blank wall where they are only giving us half the information." Then let the subcommittee and the committee make the determination to do it by order, by subpena or whatever to get them before us. Obviously we would have more control over the FBI and those people than you would. Would that not be one way of trying to deal with the situation?

Mr. LOWE. Yes. I think throughout this we have kept the subcommittee staff and obviously the chairman advised as to what problems we were having.

I would like to make one point. The Congress has had legislation giving GAO subpena power introduced several times in the past. I am not sure if there is any in the mill right now. We have felt for a long time that, in certain jobs—not necessarily just this FBI job—in order to get the information we need, we do need subpena power. Congress has never seen fit yet, at least, to grant that to us except in one piece of special legislation that just went through dealing with HEW. That would help us a whole lot.

Mr. CRYSTAL. There are a couple of pieces of legislation where we have been given subpena power. One of them is the Medicare-Medicaid Antifraud and Abuse Amendments. That was in 1977.

Another one is the Energy Policy and Conservation Act. In both of these cases we have been given subpena power.

Mr. WEISS. Is it justified—and this is a commentary on us and not on you—that we are willing to go further in our concern for the possible dollar and cents loss than about the possible constitutional safeguard losses resulting from action, potential or actual, taken by investigative agencies.

Thank you, Mr. Chairman.

Mr. PREYER. Mr. Kostmayer?

Mr. KOSTMAYER. I just have two followup questions in two areas that concern me. There may not be anything that you can do about the first one. That is that we have no way of verifying whether or not the FBI has been truthful with the citizen who has asked whether or not there is a file.

You ran into the same problem yourself and apparently you are going to follow through; am I correct? Is that a problem?

Mr. LOWE. I don't think the citizen would have a way of verifying that, no.

You have to sort of look at the FBI as a paramilitary outfit in a way. If their chief says shoot ducks, everybody shoots ducks. I think that the FBI responds that way.

When we were talking a minute ago about those 56 cases, they were not cases where they told us they had no record. Those were cases where they told their own people they had no record on it.

On the internal integrity thing that you are talking about, I think the FBI takes its marching orders and pretty well does what it is told to do. For example, on the access to records thing, if the Attorney General told them to cut out this foolishness and give GAO what they ask for then that is what they would do.

Mr. KOSTMAYER. Do you think there has been some foolishness here?

Mr. LOWE. I say that if the Attorney General were to say: "Cut out what you are doing, open up the windows and give GAO anything they want," the FBI might groan about it but they would do it.

Mr. KOSTMAYER. Do you think they have been cooperative?

Mr. LOWE. Within the constraints of that understanding, yes, very much so.

Mr. KOSTMAYER. Apparently there are two circumstances under which it is difficult for an individual to get information. One is if you have been the victim of electronic surveillance that might not have been reported to the Washington office.

Mr. OLS. That would be in the electronic surveillance index.

Mr. KOSTMAYER. Is that separate?

Mr. OLS. Yes. It is published in the Federal Register as a separate index.

Mr. KOSTMAYER. Is it part of the central file?

Mr. OLS. No. That is the key.

More than likely that individual or that case could have been part of the central record system.

Let's say it is not, then——

Mr. KOSTMAYER. It would not be part of the central records, yet it is from the central records that this information is drawn for an individual's request?

Mr. OLS. If I wrote in and asked for information from both of those indexes—the central record system and the ELSUR, as they refer to

it—then they would search both. But if I only said give me the records or give me the information you have on me, they would not search the ELSUR index.

Mr. KOSTMAYER. So it is possible that an electronic surveillance could have been conducted without your knowledge up to 3 months—a 3-month investigation. You have no way of knowing about it.

Mr. CORTINA. If you were the subject of an electronic surveillance, the record of that conversation would be in your file at headquarters.

Mr. KOSTMAYER. In Washington?

Mr. CORTINA. Yes.

They keep the case out in the field but the record would be in the main file. So when you make an FOI request, they might not tell you it was an electronic surveillance but you would get that information.

Mr. KOSTMAYER. You would?

Mr. CORTINA. Yes.

Mr. KOSTMAYER. Even though it is not part of the central file?

Mr. LOWE. Yes.

I guess we are confusing you with the term "central file." They have a lot of other files, too, but their main central record system is what we are referring to. They are centrally kept in Washington is what I mean.

Mr. KOSTMAYER. You think it is fair to say that 98 percent is available here to individuals?

Mr. CORTINA. Definitely.

Mr. KOSTMAYER. The problem still persists with information which is retained in the field offices for investigations and inquiries under 90 days. That still would not be available?

Mr. LOWE. That is only on a domestic security case.

Mr. KOSTMAYER. It is still not available?

Mr. CORTINA. It would be available only if you wrote to the field office.

Mr. KOSTMAYER. It is not available if you didn't know to write to the field office. If you only write to Washington and say, "Do I have a file with the FBI?"

Mr. CORTINA. Yes.

Mr. OLS. I would add one other comment. I would not say that it is only domestic security because I am sure that there are situations that they investigate or look into that may have nothing to do with domestic security. If the case is never opened it is never sent because the magnitude or substance of the information is not worthy of sending to central headquarters.

That goes into the 2-percent factor of information that is not here.

Mr. KOSTMAYER. That is a judgment they make?

Mr. OLS. Yes; the agents would make that judgment out in the field.

Mr. LOWE. Maybe some kid stole a can of beans in a commissary and that is a Federal crime. Somebody might have told the FBI or asked them about this thing and that is the end of that.

Mr. KOSTMAYER. Do you know how most requests from ordinary citizens are worded? Do they specify field offices or central files?

Mr. CORTINA. No; they do not. They just say, "Give me everything you have on me."

Mr. KOSTMAYER. Really they don't get everything they have on you, do they? They only get what is available in the central record system and not what is available in the field office.

Mr. CORTINA. However, the FBI has published in the Federal Register the systems of records which are supposed to be kept. They also have the addresses of all 59 field offices.

Mr. KOSTMAYER. The burden is on the citizen to understand a complex—and I think—confusing law. It is not on the Federal Bureau of Investigation to specify where this information is.

Mr. CORTINA. There is some burden on the citizen. However, we are indicating as one of our recommendations that they do tell them that only the central records have been searched. That is a matter of them being more informative.

Mr. KOSTMAYER. Your recommendation then is to provide the requester with the locations of various types of other information, other files?

Mr. OLS. They would not know the location necessarily here in headquarters where those files are.

Mr. KOSTMAYER. When they write in and say simply, "Is there a file on me," your recommendation is that the FBI do what?

Mr. OLS. That they tell them they have searched only the central record system.

Mr. KOSTMAYER. And not out in the field offices?

Mr. OLS. And not other record systems that are published in the Federal Register.

Mr. KOSTMAYER. They could tell the individual that information may be available in other files in other offices.

Mr. OLS. It would be the same system as the references they make—the "see" references—when a person is a witness to a particular crime. That individual may not be the subject of the main file but in fact the FBI doesn't necessarily examine those "see" references, unless the requester gives them a specific instance or case or time period to look for.

What we are saying is to be more responsive to the requester. Tell them, "We didn't search all of that."

If you have some idea that you may have been investigated by a field office in San Francisco or Los Angeles or anywhere else, you should tell them that.

Mr. KOSTMAYER. You have made this or you are about to make this recommendation?

Mr. LOWE. Yes, that is one of our recommendations.

Mr. KOSTMAYER. Do you know when they will respond?

Mr. LOWE. They have responded a couple of days ago.

What did they say on a specific point, John?

Mr. OLS. They had no problem with that recommendation. They did not comment on that one.

Mr. KOSTMAYER. Did they agree to abide by that?

Mr. OLS. That remains to be seen. They have not taken issue with that in their official comments to us.

Mr. KOSTMAYER. They have said nothing?

Mr. LOWE. I guess you would characterize it that they generally agreed with the contents of the report. They did take issue with a couple of things specifically.

Mr. KOSTMAYER. The number of days, for example.

Mr. LOWE. No; the substitution of analysts for agents. They didn't seem to like that one too much.

Mr. CORTINA. They also have to respond within 60 days to a recommendation.

Mr. KOSTMAYER. If they don't say anything, could you pursue specifically with them their attitude toward making the change in making people aware in this country that there could be information gathered on them in domestic surveillance and located in field offices?

Mr. LOWE. Yes. Under the Legislative Reorganization Act, section 236 of that act requires each agency head to respond within 60 days. Copies would come to the Government Operations Committee.

Mr. KOSTMAYER. Thank you, Mr. Chairman.

Mr. PREYER. Thank you.

Is it GAO's position as a matter of law that an agency has no obligation if an incomplete file search is made to notify the requester of that; is that the law right now?

Mr. LOWE. Mr. Ols feels that it is not incumbent on them to respond to the requester of such things. For example, the law does require them to publish the type of records they maintain. That is a laundry list of types of records. Presumably the burden would be on the requester to know what is in the Federal Register which is a little unrealistic in a lot of cases. Nevertheless, the burden would reside with the requester in that case.

When you add in the fact that in the central record system a vast majority of the information is referenced in the system I think the requester would probably be getting a pretty fair shake.

Mr. PREYER. Let me ask a couple of questions relating to the Privacy Act. Section 3(e)(7) of that act prohibits Federal agencies from maintaining records that describe how individuals exercise first amendment rights unless, among other things, the records have been compiled pursuant to an authorized law enforcement activity.

The Privacy Act also restricts the maintenance of Federal records which are inaccurate, outdated, and unrelated to a statutory function of the agency. How is the FBI going about complying with those requirements? Have all of their files been screened to meet those standards?

Mr. OLS. No, they have not, Mr. Chairman, mainly because of the size of the files and the amount of information that has been gathered over the years since the start of the FBI.

As far as compliance with the first amendment rights, the Attorney General has issued guidelines on what can be gathered, what kind of information as it relates to domestic security cases. So they have tried to put controls over that type of operation.

Mr. PREYER. I can see how it would be quite a burden to screen all files right now. But are they at least screened when they are disclosed to third parties or other governmental bodies?

Mr. OLS. They are very concerned in the type of information that they release so that it is not an unwarranted invasion of someone's privacy.

Mr. PREYER. How about to another Government agency?

Mr. OLS. To another Government agency, the answer would be no. They would release the information during a background check investigation to the Civil Service Commission.

Mr. PREYER. Perhaps the GAO could give us for the record ways in which the FBI could comply with those sections of the Privacy Act.

Mr. OLS. We will be happy to.

Mr. PREYER. Thank you, sir.

[The material follows:]

COMMENTS ON FBI COMPLIANCE WITH SECTION 3(e)(7) OF THE PRIVACY ACT

Section 3(e)(7) of the Privacy Act prohibits an agency from maintaining a record describing how any individual exercises a First Amendment right, unless pertinent to and within the scope of an authorized law enforcement activity. Since most records of the FBI relate to authorized law enforcement activities, the FBI is required to comply with section 3(e)(7) only to a limited extent. Where the FBI is not conducting a law enforcement activity, the prohibition would, of course, apply and the FBI could not record such activities an as individual practicing his religious beliefs or expressing his political views.

Section 3(e)(5) of the Privacy Act requires agencies to maintain accurate, relevant, timely, and complete records and section 3(e)(1) requires that agencies record only such information as is relevant and necessary to accomplish a statutory purpose of the agency. Rules have been promulgated exempting the FBI from these requirements pursuant to section 3(j), which provides:

"The head of any agency may promulgate rules * * * to exempt any system of records within the agency from any part of this section except subsection (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—

* * * * * * *

"(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws * * *."

With regard to screening of records, agencies are required to screen neither all existing records nor records being disseminated to another agency. Section 3(e)(6) requires that an agency:

"Prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section [Freedom of Information Act], make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes."

In those instances where the FBI is disseminating records to other than a Federal Government agency and is not disseminating them pursuant to the Freedom of Information Act, the FBI must comply with section 3(e)(6) by carefully reviewing records and excising material which is not accurate, complete, timely and relevant before disseminating it.

Mr. PREYER. Of all of the requests, some 17,600 that were received in the year ending September 30, 1977, only about 36 percent of them, as I understand it, required document processing. The rest of them were handled administratively. The questions arise: How much staff time is spent on handling the 64 percent of records that don't entail review of documents, and what is the grade level of employees handling that 64 percent?

Mr. CORTINA. It is not possible to break it down. The staff records for those assigned to process the 64 percent is not kept by the FBI. However, most of the people handling those answers are grade 5 and grade 7 clerical employees.

Mr. PREYER. On September 30, 1977, there were 210 analysts of 359 total FOI personnel. At that staffing level each analyst would handle only 30 cases per year to meet the total of 6,330 cases actually processed. How does that staffing level compare with other agencies, other investigative agencies?

Mr. CORTINA. Mr. Chairman, the 30 cases per analyst is not exactly the right figure because the FBI did not have 210 analysts until sometime in April. They were not fully staffed until April of 1977. For the first 6 months of the year they had somewhere around 100 people.

The 30 cases also do not tell you about the volume or complexity of the material.

As far as other agencies, the only staffing figures we could provide would be for DEA and the Air Force's Office of Special Investigations which included approximately 17 and 4½ full-time people, respectively in July of 1975.

Mr. PREYER. I realize this is a very general rule of thumb, but can you compare the overall staffing level with other agencies at least in terms of the number of pages reviewed per year? That would be just a ball park estimate.

Mr. CORTINA. We do not have the staffing level for other agencies. I doubt that most of the agencies would keep statistics as to number of pages. Most of the statistics in this area are very poor. The FBI could not even provide those kinds of figures.

Mr. PREYER. Do you have any idea of the median number of pages involved in an FOI request?

Mr. CORTINA. I don't have the median number but the FBI believes the average file is 3.2 volumes and there are 200 pages per volume. That is in the nonproject area. In the project area we are talking about more than 53 volumes or 10,000 pages.

Mr. PREYER. The average number is 3.2 volumes at 200 pages per volume?

Mr. CORTINA. Right, that is the average size.

Mr. LOWE. Out of that file there may be only 1 page or 3 pages or no pages about the particular requester.

Mr. CORTINA. That happens sometimes, They do have to screen a lot of pages before they get to the individual. For example, if you were never the subject of an investigation, they may have to go through a lot of files to be able to find where you are mentioned.

Mr. PREYER. Recently the FBI has instituted a wide-ranging records destruction program in the field offices. What effect does that have on FOIA requests for subject matter which might fall within those destroyed categories?

Mr. CORTINA. Since most of the requests come to headquarters anyway, it would have a very negligible effect. Most of that information would be maintained in the FBI files at headquarters.

Mr. PREYER. This is just in the field offices?

Mr. CORTINA. Correct. Very few requests go to the field offices. The majority of the requests to the field offices turn out to be "no record" cases or cases where material has been sent to headquarters, therefore, the request would be referred to headquarters for processing.

Mr. PREYER. Do you think that we need to give any additional study to the requirements of the schedules for records retention and destruction submitted by FBI?

Mr. OLS. I don't think so, Mr. Chairman. I know they have submitted a proposal to the National Archives and have come up with a 75-year limit and a 30-year limit, if I am not mistaken. Considering those people to be the experts, I think we would go along with their determination. They have reviewed the files. They have reviewed the justification for destroying certain records in certain periods of time. In my opinion, we should rely on them as experts in the area.

I would like to say one thing about the field offices. They do make sure that any information of a substantive nature is maintained at headquarters before those files are destroyed. This is a requirement.

Mr. PREYER. Mr. Weiss, do you have any further questions?

Mr. WEISS. Thank you, Mr. Chairman, I do not.

Mr. PREYER. I might ask Ms. Sands and Mr. Ingram if they have other questions?

Mr. INGRAM. Mr. Lowe, perhaps I can get you off the hook a bit from your replies earlier both to the chairman and Mr. Weiss with regard to the General Accounting Office's position on its right of access to FBI files and its proposed solution to that problem.

A letter was sent to the committee by the Comptroller General commenting on the bill that was introduced by the chairman, which would provide a right of access by GAO to all FBI files. The point was made in that letter, that by focusing on FBI files, you might create a situation where other agencies would then come to GAO and question its authority to have access to their particular agency's files.

In the earlier bill proposed by Congresswoman Abzug when she was chairwoman of this subcommittee, the bill would have guaranteed right of access by GAO to all Federal agency files. In the response by GAO to that bill, they had no problem with that approach.

Does that position still hold? In other words, would GAO now favor legislation introduced to clarify GAO's right of access to agency files, a bill which would cover all Federal agency files as opposed to the more specific one which would simply pinpoint right of access to FBI files?

Mr. LOWE. I remember there was a bill introduced by Chairwoman Abzug; I don't remember what position we took on it. I really can't comment on that from the standpoint of office policy.

It seems to me, though, that you would wind up with the same situation. We assume we have—under the law—access to records. If there is another law that comes along and says that we do have access to records, we are still in the same position that we are in.

Mr. INGRAM. Let me suggest that you review the earlier letter prepared by Mr. Staats and prepare a response for the record.

Mr. LOWE. Could we respond to the record on that question?

Mr. PREYER. Without objection, so ordered.

[The material follows:]

COMMENTS ON AFFIRMATION OF GAO'S

ACCESS TO FEDERAL RECORDS

By letter dated May 24, 1976 (copy attached), GAO supported H.R. 12729, 94th Congress, introduced by former Congresswoman Bella Abzug, because its purpose was to affirm the authority of the Comptroller General to have access to any books, documents, papers, or records of any Federal department or establishment for managerial and operational as well as for fiscal reviews and evaluations. H.R. 7349, 95th Congress, introduced by Chairman Preyer, affirmed GAO's access authority at only the Justice Department. Therefore, GAO did not support its enactment because it raised the possible inference that GAO's access authority is limited to that agency alone. (See attached letter dated October 26, 1977.) Even though GAO supported enactment of H.R. 12729, GAO pointed out that since it had no authority to subpoena records or to otherwise establish its right to access, it had no means of enforcing a request for access to FBI files.

GAO would like to call the Subcommittee's attention to H.R. 12171, introduced by Chairman Brooks on April 18, 1978, which strengthens the right of access of the Comptroller General to public and private records.

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-167710 May 24, 1976

The Honorable Jack Brooks, Chairman
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

This is in reply to your request for our comments on H.R. 12729, 94th Congress, a bill to amend the Budget and Accounting Act of 1921 to "affirm the authority of the Comptroller General to have access to any books, documents, papers, or records of any Federal department or establishment for managerial and operational as well as for fiscal reviews and evaluations."

The bill stems in part from our recent experiences in attempting to obtain information from the Federal Bureau of Investigation (FBI) to respond to congressional requests. Our Office has taken the position that we already have clear authority to investigate the administration and operation of the FBI; indeed, that we already have all of the authority covered in the bill. However, the Department of Justice has not recognized this authority, even though the House Judiciary Committee supported our position. Since we have no authority to subpoena records or to otherwise establish our right of access, we had no means of enforcing our request for the FBI files. Our impasse with the Department of Justice is fully set forth in our report to the House Judiciary Committee entitled "FBI Domestic Intelligence Operations--Their Purpose and Scope: Issues That Need To Be Resolved," GGD-76-50, February 24, 1976, pages 4-6, 167-171, 176-186. Copies of these pages of the report are enclosed for ready reference.

Without adequate enforcement authority, we do not know whether the amendment proposed in H.R. 12729 would help us in obtaining information from the FBI or in resolving similar controversies. Since, however, the bill states that its purpose is "to affirm the authority of the Comptroller General," thus recognizing its existence, we support its enactment.

To give effect to the clarification of our authority as set forth in H.R. 12729, we would favor the inclusion of enforcement authority such as that contained in title III, S. 2268, 94th Congress, which has not yet been enacted. This could be accomplished by adding a new section to H.R. 12729 as follows:

B-167710

"SECTION 2. Section 313 of the Budget and Accounting Act of 1921 (31 U.S.C. 54) is further amended by inserting '(a)' immediately after '313' and by adding at the end thereof the following new subsection:

"'(b) If any information, books, documents, papers, or records requested by the Comptroller General from any department or establishment under subsection (a) as amended, or any other authority, have not been made available to the General Accounting Office within a period of twenty calendar days after the request has been delivered to the office of the head of the department or establishment involved, the Comptroller General is authorized to bring an action in the United States District Court of the District of Columbia against the head of the department or establishment concerned to compel the furnishing of such material. Actions under this subsection shall be governed by the rules of civil procedure to the extent consistent with the provisions of this section. The Attorney General is authorized to represent the defendant official in such actions. In actions brought under this subsection, the Comptroller General shall be represented by attorneys employed in the General Accounting Office or by counsel whom he may employ without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapters III and VI of chapter 53 of such title relating to classification and General Schedule pay rates.'"

Finally, the designation "Budgeting and Accounting Act" in the purpose statement of the bill and in line 3 should be changed to read "Budget and Accounting Act."

Sincerely yours,

Comptroller General
of the United States

Enclosures

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-167710
GG7-270

OCT 26 1977

The Honorable Jack Brooks
Chairman, Committee on Government
Operations
House of Representatives

Dear Mr. Chairman:

You requested our views on H.R. 7349, 95th Congress, 1st Session, a bill amending section 313 of the Budget and Accounting Act, 1921 (31 U.S.C. 54) to affirm the authority of the Comptroller General to have access to all books, documents, papers, or records of the Department of Justice for managerial and operational reviews, under section 204 of the Legislative Reorganization Act of 1970 (31 U.S.C. 1154), as well as for fiscal audits conducted under section 117 of the Accounting and Auditing Act of 1950 (31 U.S.C. 67).

This bill is almost identical to H.R. 12729, submitted in the 94th Congress by Representative Abzug, except that the affirmation of our access authority in H.R. 7349 is limited to the Justice Department rather than all Federal departments and establishments. We did not object to the Abzug bill because its purpose was to affirm the Comptroller General's access authority throughout the Federal Government. Because H.R. 7349 is limited to the affirmation of our access authority at only the Justice Department and raises the possible inference that our access authority is limited to that agency alone, we do not support enactment of H.R. 7349.

We have always maintained that GAO has the statutory right of access to any books, documents, papers, or records of Federal agencies necessary to our audits, reviews, and evaluations authorized in 31 U.S.C. 53 and 54. This right was recognized in the Abzug bill's stated purpose "to affirm the authority of the Comptroller General to have access to any books * * * of any Federal department or establishment * * *" and by the fact that the books available to GAO were not limited to the "receipt, disbursement, or application of public funds." However, H.R. 7349 focuses only on one particular agency in affirming our right to all documents for managerial review purposes; there is risk that this might be used by other agencies to support the inference that the applicability of section 54 should be more narrowly construed. Should the bill pass, other agencies might contend that our access for managerial reviews is not clear. We might find ourselves negotiating access on a case-by-case basis. Our experience with our initial review efforts in the FBI proved to us that negotiation of access is unsatisfactory.

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While it is true that we negotiated an access agreement with the FBI, we did so only as a matter of practical convenience and to comply with a congressional committee request for a review. We have continually asserted our right to complete access without the need for an agreement.

Accordingly, we believe that H.R. 7349, if enacted, would be of little help to us in our work and would generate more access problems than we now have. We do not favor its passage.

Finally, the designation "Budgeting and Accounting Act" in the purpose statement of the bill and in line 3 should be changed to read "Budget and Accounting Act."

Sincerely yours,

Deputy Comptroller General
of the United States

Mr. INGRAM. You note in the report that the GAO's sample of Freedom of Information cases which actually were examined by the auditor in this particular study totaled 34 requests. Of those, only 10 percent of the 34 cases were actually examined by the GAO in unsanitized or complete versions. Is that a large enough sample or base from which to draw conclusions adequate for the preparation of your study?

Mr. LOWE. I think so, Mr. Ingram, because that was to see how they were using the exemptions. The 10 percent figure represents 10 percent of the serials in that particular file. If they had 200 serials in that particular file, that would be 20 documents which we examined.

I think for the purpose for which the sample was drawn it is okay. It is something you could not project worldwide. You could see how they used the exemption and whether it was proper.

Mr. INGRAM. The basic point though was that the initial difficulty you had with access to files did tie you up and presented some problems with your study which you have outlined today.

Mr. LOWE. That is correct, yes.

Mr. INGRAM. Let me also ask you to supply for the record a response to the earlier question that was asked by the chairman which involved an agency providing an incomplete file check to a requester. In other words, say the individual requested of an agency, "Do you have any file on me?" If the agency had 10 filing systems and they only examined three, as a matter of law would the agency be compelled to provide an answer to the individual saying that seven of the filing systems were not examined?

Mr. CRYSTAL. As a matter of law, we don't think it is a requirement that the agency respond in that manner. We think the agency should do so in the interest of openness and public disclosure. However, we do not think that it is a statutory requirement.

Mr. INGRAM. It is GAO's position, then, that when an individual makes a request to the FBI under the Freedom of Information Act and the Privacy Act, "Do you have any files on me?" and of 10 files if the FBI examines only one page or two pages, one file or three files—are you saying that there is no cutoff point as to how complete that examination has to be?

I take it there is a point at which you are saying that there is a legal obligation if there is no check at all of the files——

Mr. CRYSTAL. I am saying two things. One, there is a burden on the requester to give a reasonable description of what he is requesting. Two, there is a burden on the agency receiving the request to make a reasonable effort to retrieve those records.

Mr. INGRAM. My question, then, would go to the burden and the extent of the burden upon the agency to conduct an adequate examination of its records in responding to the individual's request, and the extent under the present law of that burden. In other words, how complete an examination is an agency required to make before telling an individual the inadequacies of that examination?

Mr. CRYSTAL. I am not sure we can come up with a general rule like that.

Mr. INGRAM. I am asking GAO to supply a response for the record.

Mr. LOWE. We will be glad to do that.

[The material follows:]

COMMENTS ON AN AGENCY'S BURDEN IN SEARCHING ITS RECORDS IN RESPONSE TO A PERSON'S REQUEST FOR HIS/HER RECORDS

The law does not provide specific guidance on how detailed a search an agency must conduct in response to a person's request for his records; nor does it specifically indicate how an agency should respond to a requester when the search has been completed. As far as the search is concerned, the agency should make a search that could reasonably be expected to discover any information requested. Where a requester asks the FBI if it has "any file on me," we think it is reasonable for the Bureau to search only its Central Records System. Since the FBI maintains several different systems and since the vast majority (probably over 95 percent) of its records appear in the Central Records System, it is reasonable to search only that system. Of course, if there is something in the request that would put a professional employee on notice that the records might appear in another system, that other system should also be searched.

As far as the form of an agency's response is concerned, the law does not specifically require that an agency advise the requester which systems were searched. While we do not think that, as a matter of law, an agency is required to specify which systems it has searched, it would be appropriate to do so. Furthermore, it would be legally improper for an agency to respond in a general way with intent to conceal the existence of, and to withhold from disclosure, records pertaining, to the requester, for example, where a request is for "any records on me" and the agency limits its search to its main system, but has reason to believe that such record might appear in another system and needs further information to locate it, the agency would be required to notify the requester that its search was limited to its main system. In other words, the agencies must act in good faith.

Mr. INGRAM. The other major point that was raised concerns the records destruction program of the FBI. As you know, the chairman mentioned that the FBI has completed a fairly massive records destruction program involving the field office files. Again, approval of this was premised on the fact—or the premise—that substantial information found in field office files is maintained in the Bureau's Washington headquarters files. Has it been GAO's experience that this is the case, or have there been instances where the General Accounting Office has found substantial information in field office files which would not be retrievable through the Bureau headquarters files?

Mr. LOWE. I will let John expand on this. But I recall in our previous review of the Privacy Act we did have some series of records that were maintained that were not fully retrievable through the central index. Some of those were listed in the Federal Register and some were not.

We recommended that they take some action to either get them in to the central index system or destroy them or do something. They have been acting on those.

Mr. OLS. Mr. Ingram, we still believe that around 98 percent is in the central record system or in Washington headquarters. Therefore, we are only talking about a very small percentage of files.

We have not made a comparison on a request to find out if there is something out there that was not sent to the requester. We just don't believe there is that much out there that is not available in the central record system.

Mr. INGRAM. Let me draw your attention to an article in the Washington Post yesterday which reported that the Chicago office of the FBI has nearly 7.7 million pages of files on suspected subversive and extremist groups. The question would then be do you know if copies of these Chicago records are maintained at FBI headquarters? Second, could you supply for the record information on whether or not similar records are maintained in other field office files?

[The article referred to follows:]

[From the Washington Post, Apr. 9, 1978]

TWO FBI OFFICIALS REVEAL EXTENT OF CHICAGO FILES

(By Rob Warden)

CHICAGO—The Chicago office of the Federal Bureau of Investigation has nearly 7.7 million pages of files on suspected "subversive" and "extremist" groups and individuals—enough to make a stack more than twice as high as the World Trade Center or a string reaching from Pittsburgh to Denver.

The extent of the files, which are maintained on the ninth floor of the Everett M. Dirksen Federal Building here, was revealed in affidavits by two FBI officials made public yesterday in connection with three U.S. District Court civil suits that charged the FBI with illegally spying on persons and groups engaged in lawful political activities.

FBI documents previously made public in connection with the suits reveal these groups are among those on whom files are kept under the "subversive" classification: the American Civil Liberties Union, the Alliance to End Repression, the Chicago Committee to Defend the Bill of Rights and the National Association of Social Workers.

Among those on whom files are kept under the "extremist" classification are the Rev. Jesse L. Jackson's operation PUSH, the Afro-American Patrolmen's League, the National Association for the Advancement of Colored People and the Congress on Racial Equality.

The affidavits revealing the extent of the files were made by Thomas E. Vornberger and James W. Awe, top officials of the FBI's records management branch in Washington.

Vornberger's affidavit says the FBI's Chicago office—one of 59 field offices nationwide—has under the two classifications 3,207 linear feet of files, including 802 feet opened after Jan. 1, 1966.

The total is enough to make two stacks as tall as the 1,350-foot World Trade Center and a third stack that would reach slightly beyond the 40th floor of the 110-story twin-tower complex in New York City.

Awe's affidavit says there are about 200 pages per inch in the average file. This means there are almost 7.7 million pages, including 1.9 million opened since Jan. 1, 1966.

Laid out end to end, that would be enough 8½-by-11-inch sheets to stretch 1,336 miles, or slightly more than the flight distance from Pittsburgh to Denver.

The extent of similar files in the FBI's 58 other field offices is unknown.

The costs of gathering the information in the Cihcago files were staggering. Just to photocopy the pages would require more than a million man-hours and cost more than $8 million, according to Vornberger's affidavit.

It has been disclosed that from 1966 to 1976, the Chicago FBI office paid out more than $2.5 million to 5,145 "informants" and "confidential sources" who contributed information to the files.

During that 10-year period, the FBI disclosed, the Chicago office opened files on nearly 27,900 organizations and individuals on whom there had been no files.

The FBI said it checked a sample of the files opened in Chicago from 1966 to 1976 and found that 84.6 percent were on individuals and 15.4 percent were on organizations.

There are four times as many subversive files as extremist files, the FBI estimated. Those classifications do not include any sedition, sabotage or other criminal investigation files.

Mr. OLS. In my opinion, those files that are referred to in the attached article are here in the central record system. That was under the old system where everything just came in, there was no timeframe.

I believe those records would be here—at least the substantive nature of those records would be here in central headquarters. But we could do something on that.

Mr. INGRAM. Thank you.

[The material follows:]

COMMENTS ON OTHER OFFICES' RECORDS SIMILAR TO THOSE MAINTAINED BY THE CHICAGO FIELD OFFICE ON SUBVERSIVE AND EXTREMIST GROUPS

Based on its prior work, GAO believes that the substantive information, if any, from the records maintained by the Chicago FBI field office and the other 58 field offices on suspected subversive and extremist groups would be included in the FBI's headquarters central records system. Other FBI field offices maintain similar records, as indicated by the following statistics from page 167 of GAO's 1976 report on domestic intelligence.[1]

NUMBER OF CASES BEING INVESTIGATED BY THE FBI IN 1974 AT THE 10 OFFICES REVIEWED

FBI field office	Subversive	Extremist	Total
San Francisco	2,943	1,938	4,881
Los Angeles	2,312	1,714	4,025
New York	2,130	1,858	3,988
Chicago	1,137	658	1,795
Columbia	140	822	962
Buffalo	603	280	883
Sacramento	400	442	842
San Diego	498	292	790
Springfield	159	613	772
Atlanta	183	537	720
Total	10,505	9,154	19,659

On the basis of available information, there is no way of knowing how many pages of files on suspected subversive and extremist groups are maintained by each field office.

Mr. PREYER. Ms. Sands?

Ms. SANDS. Thank you, Mr. Chairman. I just have a couple of questions.

You recommend setting a limit on the response time of 30 days. You indicate also that there would be fewer court cases as a result of this. Do you have an idea as to what the reduction in number of cases would be?

Mr. CORTINA. We don't know exactly what would be the reduction. But as of June 30, 1977, the FBI had 218 suits and 100 of them were because of the 10-day deadline.

Ms. SANDS. So you feel that 100 were a result of the 10-day deadline?

Mr. CORTINA. One hundred were brought in because they did not meet the 10-day deadline. It would be over 40 percent or somewhere around there.

Ms. SANDS. During your review did you ever ask the FBI why they decreased the number of agents participating in Project Onslaught? It seems to me that the project was started initially to eliminate the backlog. Yet, when they started the project they reduced the number of participating agents. They also decreased the planned length of time spent on the project by some of the agents. Do you have any idea why these changes were made?

Mr. CORTINA. What happened was this. The initial processing unit within the regular branch was not able to process enough cases to keep the same number of agents—200 agents—busy for the next 6 to 8 weeks. Therefore, they suggested that, with the number of cases they could get ready, they would only need 84 agents.

However, if the branch would have been more effective in terms of preparing all those cases, they would have been able to keep more of them for a longer period of time.

[1] FBI Domestic Intelligence Operations—Their Purpose and Scope: Issues That Need To Be Resolved (GGD–76–50, Feb. 24, 1976).

Ms. SANDS. That raises a lot of other questions but you should not have to answer those.

Thank you.

Mr. PREYER. Thank you.

We certainly appreciate your being here today, Mr. Lowe, Mr. Ols, Mr. Cortina, and Mr. Crystal. Thank you very much for your very useful, well-done report.

Mr. LOWE. Thank you, Mr. Chairman.

Mr. PREYER. We look forward to continuing to keep in touch with you. We will keep the record open for a few days.

If there is nothing further, the committee will recess at this time.

[Whereupon, at 11:55 a.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.—FBI ASSESSMENT OF PROJECT ONSLAUGHT

NINETY-FIFTH CONGRESS

Congress of the United States

House of Representatives

GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS
SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS

RAYBURN HOUSE OFFICE BUILDING, ROOM B-349-B-C
WASHINGTON, D.C. 20515

September 23, 1977

Honorable Clarence M. Kelley
Director
Federal Bureau of Investigation
Washington, D.C. 20535

Dear Mr. Kelley:

With the scheduled end of Project Onslaught in October, the Subcommittee will be interested in your assessment of its operation. Upon its conclusion would you please provide us your views and analysis of the Project, including information on these points:

1. Is there any backlog of initial Freedom of Information Act or Privacy Act inquiries or appeals remaining which have not been responded to within the statutory period? If so, please describe, including the quantity of such requests and how long you anticipate it will take to complete processing them.

2. How long does it now take to process new initial inquiries and new appeals? Is there any particular category of inquiry or appeal which cannot be handled within the statutory time periods?

3. What were the accomplishments of Project Onslaught?

4. How did the actual cost and time of Project Onslaught compare to the estimates of cost and time made before the project began?

5. What processing techniques or other improvements, if any, have been or will be put into regular use as a result of experience from the project.

6. Did the project demonstrate whether requests can be handled at least in part by lower level employees than formerly thought necessary?

7. What changes, if any, in record collection and maintenance have you implemented or do you plan to implement as a result of this project and your other experience with FOIA and the Privacy Act?

8. What impact has the Attorney General's letter of May 5, 1977, had on FBI decisions to grant or not grant access requests?

9. What deficiencies, if any, did the project have or disclose?

We recognize this project was a major undertaking on the FBI's part to eliminate a serious problem. We congratulate you on this effort and hope to hear that it indeed did succeed.

Sincerely,

Richardson Preyer
Chairman

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

November 29, 1977

Honorable Richardson Preyer
Government Information and
Individual Rights Subcommittee
Committee on Government Operations
U.S. House of Representatives
Washington, D.C.

Dear Mr. Chairman:

This is in response to your September 23, 1977 letter addressed to Clarence M. Kelley requesting the FBI's assessment of Project Onslaught.

Enclosed is a memorandum prepared by the Federal Bureau of Investigation responding to your request.

Sincerely,

Patricia M. Wald
Assistant Attorney General

Enclosure

OFFICE OF THE DIRECTOR

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

November 21, 1977

PROJECT ONSLAUGHT
FREEDOM OF INFORMATION-PRIVACY ACTS BRANCH
FEDERAL BUREAU OF INVESTIGATION

The Honorable Richardson Preyer, Chairman of the Government Information and Individual Rights Subcommittee of the House Committee on Government Operations, inquired by letter dated September 23, 1977, and requested the Federal Bureau of Investigation's (FBI) assessment of Project Onslaught. The following is in response to that letter. Numbered paragraphs correspond with numbered paragraphs 1 through 9 in Chairman Preyer's letter.

Project Onslaught was the second phase of a two phase plan submitted by the Director of the FBI to the Congress to reduce the backlog of Freedom of Information-Privacy Acts (FOIPA) requests during the Summer of 1976. The first phase involved an expansion of the manpower permanently assigned to FOIPA work which resulted in the formation of a Branch consisting of 377 personnel whose efforts were devoted full time to processing FOIPA requests. Project Onslaught was proposed as a temporary operation involving the assignment of two or three groups of Special Agents from field offices for a total period of six months. Estimates of cost at that time for Project Onslaught ranged from $4,911,764 to $5,137,164. In June, 1977, this estimate was revised upward to $5,848,000 based upon inflation and escalating operating costs.

1. As of November 4, 1977, the FBI had 3,239 unassigned requests on hand and 2,085 requests assigned and being processed or in some stage of appeal or litigation. Of the 3,239 unassigned requests, however, only 893 were "perfected," meaning records responsive to the request had been determined to exist and the identity of the individual requesting them, when relevant, had been evidenced. The priority date of the next non-project request ready for assignment was September 12, 1977. A project request in our

system is one in which 3,000 or more pages of records exist responsive to the request. A non-project request requires processing of less than 3,000 pages of material. The priority date of the next project request ready for assignment was September 6, 1977. Unassigned requests on hand which were not "perfected" fall into several categories: the requester has been asked to furnish additional information concerning the subject of his request to enable the FBI to conduct a file search, or to furnish a notarized signature; inquiries about to be closed for failure to respond to such requests or because no records can be located; and inquiries too recently received to categorize their status.

On April 29, 1977, the last workday before the commencement of Project Onslaught, there were 6,231 unassigned requests on hand and 1,254 requests assigned and being processed or in some stage of appeal or litigation. The date of receipt of the next non-project case ready for assignment was June 20, 1976. The date of receipt of the next project case ready for assignment was January 19, 1976.

A fourteen-month delay has, therefore, been reduced to a two-month delay with regard to project requests. With regard to non-project requests a ten-month delay has been reduced to a two-month delay. In reality, this understates the gains of Project Onslaught. In April, 1977, there were numerous lengthy project requests which, although assigned and being processed, had been received in early 1975 and were proceeding very slowly. These older requests have been processed and either have been released or are scheduled for release in the near future.

Obviously, there remain requests which have not been responded to within the statutory period, and we do not feel the expectation of achieving the statutory deadline reasonable or practicable. Our goal is that of the Department of Justice, which is a thirty-day "turn around time" for all but the most difficult and voluminous requests.

Achievement of this thirty-day goal is not predictable at this time although we continue to make steady progress. We anticipate greater progress as soon as we finish the backlog of FOIPA appeals, particularly those attributable to disclosures made during Project Onslaught. These continue to consume the time of our personnel, preparing and presenting them, and to remove personnel from processing new requests.

2. We acknowledge initial inquiries, on the average, within ten working days. In most instances we are able to advise a requester when there are no records concerning him or responsive to his request within the same ten-day period. Because of the infinite variety of requests made as well as the infinite variety of records on hand responsive to those requests, an average time to complete processing cannot be stated. The relative volume, complexity and sensitivity of individual records each may affect the processing of the records and, consequently, delay final disclosure of the records sought. We hope to achieve the above-mentioned thirty-day turn around time during the next three months, dependent, of course, upon progress in handling administrative appeals, and on there being no radical changes in our request receipt rate or current FOIPA litigation.

We are unable to specify the time required to handle new appeals, since this function is the responsibility of the Deputy Attorney General and his staff, and appeals are addressed to him.

3. Session A of Project Onslaught concentrated primarily on non-project requests. They processed 3,017 requests of which 2,493 were closed as of November 4, 1977, 2,242 of those by final disclosure. Those still pending include 165 in which the requester has yet to submit duplication charges incurred after being notified of the amount required, and 143 delayed pending consultation with other Government agencies.

Session B concentrated on 47 project requests which comprised 3,071 sections (volumes) of documents. In addition, Session B processed 220 non-project requests, of which 86 are already closed, 80 by disclosure. Similarly, 12 of these requests which are still pending are those in which the requester has yet to furnish copying fees, 25 involve requests in which a partial disclosure has been made with more disclosures to follow, and 81 are concerning processing of a single historical request the full disclosure of which is being coordinated among most requesters because of the intense media interest in the records.

We estimate Project Onslaught Agents processed 2,264,569 pages of FBI records of which 1,225,332 will be released in whole or in part. We consider this a formidable accomplishment particularly in light of the temporary nature of the assignment. One hundred and ninety-eight law trained Special Agents were assigned to the first session of Project Onslaught.

Eighty-four law trained Special Agents were assigned to the second session. All were removed from their field investigative assignments for periods of two to five months. With one week's training they were immediately and highly productive.

The individual and collective effort of both the temporarily assigned and the permanently assigned FBI personnel has enabled us to achieve our present status which is relatively current and which we expect to continue to improve.

4. Project Onslaught was originally conceived to consist of two or three successive groups of 200 Special Agents each temporarily assigned from field offices to FBI Headquarters for a total of six months. Due to problems involved in locating working space for the expansion of our permanent FOIPA staff, which necessitated relocating the civil fingerprint files of our Identification Division in leased space at Buzzards Point, Project Onslaught could not commence until May 2, 1977. It was, therefore, immediately reduced from six to five months since both the fiscal year and the time allowed expired September 30, 1977. In addition, the high rate of productivity maintained by the Special Agents on Project Onslaught enabled us to release 147 of the 198 Special Agents from the first session on June 24, 1977. They had been scheduled to remain until July 15, 1977.

The same high productivity allowed us to reduce the second session from 202 Special Agents to 84. They reported as scheduled on July 11, 1977. By September 2, 1977, however, 37 of them had been released to return to their investigative duties.

In general, the original estimate of $4,911,764, updated to $5,548,000, should be reduced by one-sixth since the Project was reduced by one month. The resultant figure should be further reduced by 25 percent since it was not necessary to use 200 Agents on each session. The combined rough reduction would result in a predicted expenditure of $3,655,000 for the Project. Although incomplete due to unavoidable lag time in the recording and posting of actual expenditures, our records reflect the cost of Project Onslaught as of October 28, 1977, was $2,820,153.01. When completely posted, actual expenses are expected to approximate more closely the adjusted figure of more than three million dollars.

5. Almost coincidental with the commencement of Project Onslaught we fully implemented an excising procedure which had long been under research and development. It involves

the uses of felt-tipped marking pens and colored tape to delete exempted material from our records. When reproduced on specially altered duplicating equipment a final copy is made from which exempted material is effectively deleted. The working copy of the records processed for disclosure may be reviewed by supervisory and appeal personnel in its entirety since the material being exempted is legible through the marking pen and the tape. We have also subsequently developed a method of removing the markings of the felt-tipped marking pen when supervisory or appeal personnel differ with the processor and wish to disclose additional portions of the record. Both techniques were refined during Project Onslaught and will add to our efficiency. Their primary advantage, of course, is the greatly increased speed with which exempted material can be excised from records as they are processed.

In addition, and through necessity, we have experimented with various approaches of organizing small- and medium-sized groups of processors so that they may all handle a large and voluminous record in as consistent a manner as possible. We were able to see the advantage of having the same units of personnel work on both project and non-project-sized requests since the variety allows the leader of the group to assign work in a fashion which will more effectively use their time. Although no major breakthroughs in this area were developed, the experience will be of great assistance in refining both the organization and the procedures for our permanent staff.

Perhaps the most important lesson of Project Onslaught is our conclusion that a recurrence must be avoided at almost all costs. We are fervently dedicated to avoiding the necessity for a Second Annual Project Onslaught.

6. The personnel assigned to Project Onslaught were actually higher level employees than those normally used. Although arguably more productive, they had the advantage of having the more administrative aspects of responding to requests handled by other personnel. A permanent organization along these lines would, however, be unworkable even were there not a tremendous and unaccepted waste of investigative manpower incurred. We are continuing to experiment with the use of non-investigative personnel, experienced in FOIPA processing, in supervisory capacities where we have in the past felt investigative personnel were required. Project Onslaught contributed to our experience in this area and to our consideration that this can be achieved. It will be implemented on a gradual and an experimental basis without jeopardizing our overall productivity and our efforts to receive an absolutely current status in response time.

Project Onslaught did not, however, lead us to conclude that requests can be processed by lower level employees. Balancing the statutorily mandated objectives of maximum disclosure and preservation of the ability of an investigative agency to accomplish its primary functions is not for the novice. The organization of our permanent complement does isolate different functions, permitting lower level employees to handle part of the administration of requests. We have just completed a review of one such function, however, in which requests are initially received and acknowledged, searches conducted, and records located and duplicated. The review was made by an FBI audit team from outside FOIPA Branch and it concluded that productivity and overall quality would improve if the number of personnel and their grade level in this operation were both increased.

7. Personnel permanently assigned to FOIPA work have for some time been convinced of the necessity to reduce the size and scope of records maintained to those absolutely necessary to the FBI's accomplishment of its operational mission. Project Onslaught has provided emissaries to convey this message into almost every field office of the FBI more effectively than any written or verbal instructions or explanations could accomplish. The FBI, in cooperation with the National Archives and Records Service and in coordination with interested Congressional groups is moving ahead with an acceptable records destruction program which we hope will reduce our burden of FOIPA processing without degrading our ability to accomplish our investigative responsibilities.

8. The Attorney General's letter addressed to the Heads of All Federal Departments and Agencies concerning the Freedom of Information Act (FOIA) aimed at reducing litigation and greater adherence to the spirit of this legislation by application of a "harm" theory to disclosure requests. This policy of the Attorney General, of course, applies also to the FBI.

The FBI had already, of its own accord, adopted such a "harm" theory. The letter, therefore, has had little effect on FBI decisions to grant or not grant access requests. Of some impact, however, have been several subsequent decisions by the staff of the Deputy Attorney General with regard to exempting information from records being disclosed on the grounds of privacy of third parties. Pursuant to this policy we are now releasing more information, the disclosure of which the FBI and the Department had heretofore considered as violative of the privacy interests of persons other than the requester.

Although the Attorney General's letter and subsequent action by the staff of the Deputy Attorney General have had some effect on the extent of our disclosures, we have not seen nor do we expect to see a reduction in litigation. We believe that requesters who are inclined to litigate denials of portions of the records disclosed to them will continue to seek redress in the courts unless and, in some cases, even if disclosures are made with no deletions whatsoever. This, of course, is unacceptable to both the FBI and the Department of Justice, and is not in keeping with the Congressional intent expressed in the enactment of the various exemptions from disclosure in the FOIPA. During the summer months we detected a seasonal decline in new litigation but have recently experienced an apparent increase in litigation.

9. Deficiencies encountered during Project Onslaught were mainly inherent in the concept of the Project itself. Introducing even law trained Special Agents to these two disclosure statutes and training them to apply them to FBI records, resolving the exquisite questions of privacy interests and protection of confidential sources was an ambitious undertaking. From an organizational standpoint we determined from experience that one supervisor, even with a highly capable assistant, cannot handle twenty employees performing FOIPA processing. Ten personnel, however, was found to be an acceptable supervisory ratio.

No new problems or interpretations of the statutes evolved although the same problems of pending investigations, third party privacy, protection of confidential sources and investigative techniques, and resolving the conflicting interests inherent in public disclosures of investigative records remain the same. Greater volume brought only recurring examples of the same basic problems, and increased potential for inadvertent releases of exempted material, the cumulative effect of which will inevitably degrade our investigative capacity.

The FBI is gratified by Congressional interest in and concern for a most serious problem. Our efforts as outlined above have been considerable. We consider Project Onslaught to have been a success. We continue to work diligently toward improving our response time even further, although as mentioned above, we do not believe the statutory deadlines to be realistic. We would welcome the opportunity to discuss our experiences and possible resolutions to problems posed by disclosure of investigative records with you or your staff.

OFFICE OF THE DIRECTOR

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

March 2, 1978

MAR 1978

Honorable Richardson Preyer
Chairman, Subcommittee on Government
Information and Individual Rights
Committee on Government Operations
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

By memorandum dated November 21, 1977, former Director Clarence M. Kelley advised you regarding our assessment of "Project Onslaught," and the current status of our handling Freedom of Information-Privacy Acts (FOIPA) matters. This memorandum was in response to your inquiry of September 23, 1977.

It was reported therein that we did not feel the expectation of achieving the statutory response deadlines to be reasonable or practicable, but that we were making every effort to attain the goal of a thirty-day "turn around time" for all but the most difficult and voluminous requests. We expressed the hope of being at the thirty-day turn around time within the subsequent three months, dependent on there being no radical changes in our request receipt rate or FOIPA litigation.

Although our daily receipts since our November, 1977, memorandum have increased slightly, the most significant development impacting our current FOIPA operating status has been the litigation involving the Rosenberg case. Over 30,000 pages of disclosable information were released from our Headquarters files in 1975; however, plaintiffs, the sons of Julius and Ethel Rosenberg, are seeking access in this single request to records of over eighty individuals and two organizations. In addition to Headquarters records, plaintiffs'

Honorable Richardson Preyer

request also involves the search of many New York Field Office records, as well as those maintained in ten other FBI field offices. Recently, the U. S. District Court hearing this matter ordered us to review records at the rate of 40,000 pages per month, providing disclosures on a monthly basis. To meet the mandate of this order, we have assigned over seventy employees in our FOIPA Branch on a full-time basis to this request. We have implemented a six-day work week on a regular basis, and hope to complete the project in approximately eight to eleven months.

In addition to this litigation matter, we recently have been required to divert fifteen employees normally assigned exclusively to FOIPA matters to our Congressional Inquiry Unit. This Unit was initially formed to handle requests from the House Select Committee on Assassinations, U. S. House of Representatives, for access to our files relating to the assassinations of President John F. Kennedy and Dr. Martin Luther King, Jr. This additional staffing was necessary in view of recent heavy demands made upon the Congressional Inquiry Unit as a result of increasing Committee requests.

It is apparent that this commitment of manpower has seriously impacted our ability to handle our other FOIPA requests, and impaired progress to our goal of a thirty-day response time. Our current authorized complement of 379 was based on an average daily receipt of 62.4. During fiscal year 1978, we have received an average of 71.52 requests per work day. We now estimate our turn around time for the average request to be approximately 90 days.

I desire to bring this to your attention because of our mutial concern for the FBI's responsibilities regarding the FOIPA, and particularly the requirement to respond to requests in a timely manner. Should you or your staff desire any further information concerning this matter, representatives of our FOIPA Branch will be most happy to meet with you.

Sincerely yours,

William H. Webster
Director

APPENDIX 2.—GAO ACCESS PROBLEMS AT FBI

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

GG8-109

B-179296 March 29, 1978

The Honorable Richardson Preyer
Chairman, Subcommittee on Government
Information and Individual Rights
Committee on Government Operations
House of Representatives

APR 11 1978

Dear Mr. Chairman:

Your January 10, 1978, letter expressed concern that the FBI continues to deny us access to raw investigative files and requests information on the problems we have encountered as a result of the limited access. This matter was discussed with you recently and we have given it further consideration.

As you know, we negotiated an agreement with the FBI (see enclosure I) concerning our procedures to review FBI programs and operations. We entered into this agreement as a matter of practical convenience and to comply with a congressional committee request for a review. Our agreement stated, and we have continuously expressed to FBI officials, that our statutory authority clearly provides for us to have access to FBI files and documents. Such access is necessary for us to independently determine how, and to what extent, FBI policies and procedures are being implemented.

Our agreement has led to smoother day-to-day relations with the FBI and has given us access to most of the information we need to conduct our reviews. However, we share your concerns that we have not been given full access to investigative files. Full access to these files would increase our ability to respond to the needs of the Congress in a timely manner and increase the credibility of our reports because we would not be dependent on FBI-prepared summaries of the case files. Access to records problems, or the time required for FBI personnel to provide required data, have contributed to delays in almost every review at the FBI. Our concern is that in the future our work will continue to be time-consuming as long as we do not have full access to investigative files. Without full access to FBI files, we will

--have lengthy negotiations when work in a new area is begun;

GG8-109

--be required to use FBI-prepared summaries of case files for conducting reviews of operating programs; which is a time-consuming and costly procedure both to the FBI and GAO;

--take longer to form valid assessments of FBI operations because greater reliance must be placed on time-consuming interviews with FBI agents;

--have to resort to unnecessary verification procedures in an effort to insure the validity of FBI-prepared information. The extent of verification involves a trade-off between increasing the sample size to increase assurances of reliability and minimizing the sample size to speed the completion of the audit.

In some instances, meaningful reviews probably cannot be performed without unrestricted access to all files. For example, a review of the management of the FBI informant program would be severely hampered and possibly not worth doing without access to files. Informants are an integral part of investigative activity and have been a subject of major concern by congressional committees and the Justice Department. Also, reviews of the FBI's foreign counterintelligence and organized crime programs--two of the Bureau's top three priorities--would be difficult, if not impossible, without access to files. Similar difficulties could be anticipated in performing a review of the FBI's very sensitive electronic surveillance activities.

Although we are not satisfied with the lack of full access to the FBI's records, we do not believe that legislation affirming our already existing right to such access is desirable. In a letter dated October 26, 1977, (copy enclosed) commenting on H.R. 7349,* we advised the Chairman of the Committee on Government Operations that we were concerned that such legislation would only dilute our authority and generate more access problems than we now have. We believe it would be better to use other alternatives, such as authorization and appropriation hearings to raise and attempt to resolve the issue. At the most, if the Subcommittee decides to legislate, we believe it would be better to do so in the form of a broad affirmation of the Comptroller General's access authority throughout the Federal Government, particularly with respect to the conduct of management reviews.

[*Subcommittee note: This letter reproduced at p. ___ of this hearing volume.]

GG8-109

Before closing, we must give due recognition to the FBI for the cooperation we have been receiving. Within the constraints imposed on them by virtue of the agency's interpretation of our access rights, FBI officials have consistently come more than half way in an effort to help us get our work done as effectively and expeditiously as possible.

We appreciate the interest you and your Subcommittee have taken in our access to records situation at the FBI and we hope the enclosed information will be useful in your further consideration of the issue.

Sincerely yours,

Comptroller General
of the United States

Enclosures - 3

ENCLOSURE I

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-179296

May 21, 1976

The Honorable Clarence M. Kelley
Director, Federal Bureau of
Investigation
Department of Justice

Dear Mr. Kelley:

Following our March 23, 1976, meeting with the Attorney General, subsequent meetings with members of your staff, and my May 12 conversation with you, we are furnishing you the procedures under which the General Accounting Office plans to review FBI programs and operations. Our procedures will be similar to (1) those we followed during our review of the FBI's domestic intelligence program and (2) those of which we advised the Deputy Attorney General in Mr. Lowe's March 10, 1976, letter.

As with other programs of the Department of Justice, and other Federal agencies as well, the GAO will review the efficiency and economy, and effectiveness of the FBI's programs and operations. We will advise the Department of our plans as we initiate new assignments at the FBI in accordance with our previously established procedures for all work at the Department. Additionally, we will advise the FBI, in writing, of the overall objectives and scope of anticipated reviews, an estimate of the time frame of such efforts, the FBI facilities and locations we will visit, and a general description of how we intend to carry out the reviews. We will also advise the FBI of the nature of interviews of FBI employees we will undertake during our reviews and will work through a designated FBI liaison in arranging for these interviews.

ENCLOSURE I

B-179296

As we did with our report on the FBI's domestic intelligence operations, issued February 24, 1976, we will give the FBI the opportunity to review draft reports on the results of our reviews to determine whether they contain any sensitive information which the FBI believes might compromise its operations. If GAO and FBI staffs cannot promptly resolve all differences, the matter will be referred to the Comptroller General and the FBI Director for resolution.

After agreement has been reached on the extent to which sensitive material will be included in draft reports, we will formally submit the draft reports to the Department of Justice and FBI for their comments in accordance with GAO reporting procedures. Any comments will be added to GAO's final reports.

There is the possibility that GAO might receive requests from congressional committees or Members to obtain FBI documents or files of specific individuals or specific groups, including those which the FBI may, on its own, refuse to provide to such a requestor. It is our policy not to serve as a conduit for such information. We will advise the requestor that he should deal directly with the FBI in such cases.

We will need to review FBI documents during our audits of FBI programs and operations. It should be understood that a request for and use of documents during our work does not necessarily mean that information in the documents will be included in GAO reports.

The FBI has maintained that GAO should not have access to individual investigative files. We have continually emphasized that we needed such access to determine how, and to what extent, FBI policies and procedures are being implemented. The FBI is concerned that public knowledge of our access to such files could weaken the Bureau's credibility and negatively affect its capability to develop informants. The FBI policy has been that all information received from informants is received on the basis that it will be treated in strict confidence and that neither the name of the informant nor the information which he provides will ever be released outside the Bureau in a form that could lead to identification of the informant.

ENCLOSURE I

B-179296

In our opinion, our statutory authority clearly provides for us to have access to FBI files and documents. However, in order to expedite our initiation of further work at the FBI, we will agree to try the following arrangement.

--The names of all informants, confidential sources, and other appropriate individuals will be excised from all FBI documents provided GAO. Additionally, if information obtained in certain instances would identify the informant, the FBI and GAO staff will discuss the matter and work out a procedure so such information is not presented in a way that could result in identifying the informant.

--GAO will be provided copies of appropriate FBI policy documents (e.g., Manuals of Instruction, and Rules and Regulations) and policy correspondence as they pertain to specific reviews GAO initiates and on individual request.

--In lieu of complete access to investigative files pertinent to specific GAO reviews, GAO will be provided:

(a) A brief general description of documents in the file. (This can be orally or in writing, depending on the circumstance.)

(b) Copies of report synopses and letterhead memoranda.

(c) Copies of additional file documents on a selected basis, when information in the documents noted in (b) above is not sufficient. This step would not be performed on a large-scale basis so as to reconstruct a particular file or substantial portions thereof.

--If GAO believes it is necessary, after reviewing information provided in (a), (b), and (c) above, that it must have a more complete description of documents in the file, the case summary technique

ENCLOSURE I

B-179296

used during GAO's review of FBI domestic intelligence operations will be employed. However, due to its time-consuming nature this technique will be avoided whenever possible.

--Active investigations will not be reviewed by GAO where disclosure of any information contained in such cases may prejudice the prosecutive process.

GAO will state in each report the extent to which it had or did not have access to FBI investigative files.

Documents requested by GAO should be provided as quickly as possible. If a situation occurs where GAO asks for a document that the FBI considers to be highly sensitive and not releasable and FBI and GAO staff cannot promptly resolve the issue, the FBI Director and the Comptroller General will informally discuss and resolve the matter.

In carrying out our reviews, we will not disclose the names or otherwise identify individuals and we will not disclose or identify specific groups that were, or are, the subjects of investigative files to anyone outside GAO, and within GAO, only on a need-to-know basis, unless such individuals or groups have been publicly identified by the FBI.

We will take all necessary precautions to protect any documents provided to us by the FBI, and will honor any security classifications applied to those documents. All information will be treated in the greatest confidence and in accordance with FBI security standards to prevent even inadvertent release of sensitive information. All GAO staff working on FBI reviews will at least have "Secret" security clearances and to the extent possible "Top Secret" security clearances. Also, we will retain appropriate FBI documents and pertinent GAO workpapers at locations approved by the FBI.

ENCLOSURE I

B-179296

If the above arrangements are satisfactory, please advise me in writing of your agreement. I suggest that, after your concurrence, copies of this letter and your letter to me agreeing to the arrangments be made available to all staff in the GAO and FBI who will be involved in our reviews.

Sincerely yours,

Comptroller General
of the United States

OFFICE OF THE DIRECTOR

ENCLOSURE I

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

May 24, 1976

BY SPECIAL MESSENGER

Honorable Elmer B. Staats
Comptroller General of the United States
Washington, D. C.

Dear Mr. Staats:

I am in receipt of your letter dated May 21, 1976, detailing the procedures with which the General Accounting Office is to conform during its review of the FBI's operations. I agree with the arrangements set out therein and I will make them known to the Attorney General and to those in the FBI who may be involved in your reviews.

I want to thank you for your consideration in resolving this matter and I am pleased we have been able to agree and can move forward with the reviews.

Sincerely yours,

Clarence M. Kelley
Director

1 - The Attorney General - Enclosure
1 - The Deputy Attorney General - Enclosure
1 - Assistant Attorney General for Administration - Enclosure

ENCLOSURE II

EXAMPLES OF HOW SPECIFIC GAO PROJECTS

WERE HINDERED BY LACK OF ACCESS

Completed assignments

1. FBI Domestic Intelligence Operations--Their Purpose and Scope: Issues That Need to be Resolved, GGD-76-50, Feb. 24, 1976

Because this was our first audit of FBI operations, we faced unique problems in gathering the necessary information. This necessitated time-consuming negotiations, which have not been equalled since. The review illustrated the problems associated with using FBI-prepared case summaries. Our audit progress was delayed because of investigative priorities by special agents and stenographic vacancies which slowed the case summarization process. One FBI field office summarized only five cases in 7 weeks and two other field offices were nearly as bad. The resulting delays were an important factor contributing to doubling the time initially anticipated to perform the review.

2. The FBI's System For Managing Investigative Resources and Measuring Results--Improvements Are Being Made, GGD-78-1, Feb. 15, 1978

Uninformative report synopses obtained from case files, required that we hold lengthy agent interviews. These interviews were necessitated to clarify the information in the report synopses. The interviews required us to use an additional 200 staff days over what we probably would have used if we had full access to the files.

3. FBI Domestic Intelligence Operations: An Uncertain Future, GGD-78-10, Nov. 9, 1977

Because of the requirement to use FBI-prepared case summaries, we estimate that an additional 250 staff days were required to complete the review. Again, delays were experienced in having the case summaries prepared and scheduling followup interviews with agents. Additional time was also expended verifying summarized documents.

ENCLOSURE II

Assignments in process

4. Review of FBI bank robbery investigations

Our experience in the survey and the review phase of this audit illustrate the continuing need to reinterpret the working agreement, negotiate access, and rely heavily upon personal relationships to accomplish audit objectives. The FBI/GAO agreement states that copies of report synopses and letterhead memoranda will be provided to us. However, aspects of most FBI investigations are set forth in reports which comprise most of the file, rather than report synopses and letterhead memoranda. Complete access to these reports has been denied by the FBI on the grounds that they would serve to "reconstruct a particular file or substantial portions thereof." We encountered this problem in the survey phase of this audit.

To clear the way for the survey, we worked with the FBI liaison in developing an access policy. This policy provided that after our initial examination of report synopses, letterhead memoranda and certain other documents on cases selected for review, we could request additional backup or source information to clarify the case and copies of such requested documents would be provided. During the survey, we obtained liberal, but not total, access to investigative reports. Based upon our survey experience, we knew access to almost all investigative reports would be necessary to adequately evaluate FBI bank robbery investigations during the review phase of the audit at six FBI field offices.

The FBI liaison agreed that access to the entire case file would be necessary for us to abstract the information necessary to accomplish our audit objectives. He took the position, however, that this would not be in keeping with the intent of the agreement and, therefore, most of the information should be obtained through interviews with FBI agents. The FBI liaison acknowledged our need for verification of the FBI agents' interpretation of the case file. He said, however, this should be done by providing excised copies of portions of reports rather than permitting agents to show non-sensitive file material to us during the course of the interview.

APPENDIX 3.—GAO REPLIES TO FOLLOWUP QUESTIONS

NINETY-FIFTH CONGRESS

Congress of the United States

House of Representatives

GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
RAYBURN HOUSE OFFICE BUILDING, ROOM B-349-B-C
WASHINGTON, D.C. 20515

April 26, 1978

Mr. Victor L. Lowe, Director
General Government Division
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Lowe:

Thank you again for your thoughtful testimony before the subcommittee April 10, 1978, on GAO's evaluation of the handling of Freedom of Information and Privacy Act requests by the Federal Bureau of Investigation.

There were several areas we did not have time to fully explore at the hearing, and I ask that you supply for the record written answers to the attached questions.

Sincerely,

Richardson Preyer

Richardson Preyer
Chairman

31-335 105

Enclosure

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

GENERAL GOVERNMENT
DIVISION

JUL 6 1978

B-173761

The Honorable Richardson Preyer
Chairman, Subcommittee on Government
Information and Individual Rights
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

In your letter of April 26, 1978, you requested answers to specific questions in several areas not fully covered at the April 10, 1978, hearings, on our evaluation of how the FBI handles Freedom of Information and Privacy Acts requests. Our responses to your questions are contained in enclosure I. Enclosure II* is a copy of the March 30, 1978, letter from the Assistant Attorney General for Administration containing the Department of Justice's comments on our draft report.

I appreciate your comments on our testimony and trust that the enclosed information will be useful to your Subcommittee.

Sincerely yours,

Victor L. Lowe
Director

Enclosures - 2

[*Subcommittee Note: Not reproduced here; available in subcommittee files.]

ENCLOSURE I

QUESTION 1: Exemption 7 of the FOIA is available for some investigatory records compiled for law enforcement purposes. Records of criminal investigations qualify, but it is not clear when routine investigations, audits, or management studies become investigations within the meaning of the seventh exemption. Does the FBI maintain any records (other than administrative) that are not investigatory records? Are GAO audit workpapers civil law enforcement records as defined by the seventh exemption?

ANSWER: The FBI's records are either investigative or administrative, which would include audits and/or management studies. All FBI records can be classified into one of these categories, although some records contain both types of information. For example, an employee's personnel records usually would include standard administrative Civil Service Commission forms as well as background investigatory information on the employee.

5 U.S.C. 552(b)(7) exempts from mandatory disclosure under the Freedom of Information Act "investigatory records compiled for law enforcement purposes" to the extent production of the records would have certain enumerated effects. Since GAO is not subject to the Freedom of Information Act, however, GAO audit workpapers need not qualify for the (b)(7) exemption in order to justify withholding them from disclosure. Further, GAO regulations on the public availability of GAO records, 4 C.F.R. 81, specifically exempt GAO workpapers from disclosure. That exemption may be, and often is, waived so that the papers, or portions of them, may be disclosed. If GAO were subject to the Freedom of Information Act, whether or not GAO audit workpapers were law enforcement records within the meaning of the (b)(7) exemption would depend upon the nature of the workpapers and the particular audit to which they belong.

QUESTION 2: Many Freedom of Information Act requesters ask for copies of any agency records about themselves. (a) Does the FBI have a legal obligation to search every record system in response to such a request? (b) If not, does the agency have a legal obligation to inform requesters that it has not conducted a complete search of all filing systems? (c) Isn't it misleading for an agency to conduct a more limited search than was requested unless the nature of the search is fully described?

ENCLOSURE I

ANSWER: (a) The FBI does not have a legal obligation to search every system in response to a request for any records about the requester. As we indicated in answers previously supplied to the Subcommittee for the record (on pages 65-66 of transcript of hearings of April 10, 1978), it need only search those systems which could reasonably be expected to contain any information requested. Where a requester asks the FBI for any agency records about himself, it is reasonable to expect, unless the employee processing the request has reason to believe otherwise, that if the Bureau has any information on the requester, it would be in the central records system.

The Freedom of Information Act, at 5 U.S.C. 552(a)(3), requires that requesters reasonably describe records being sought. According to H.R. Rep. No. 876, 93rd Cong., 2d Sess. (1974), 1974 U.S. Code Congressional and Administrative News 6271, "a 'description' of a requested document would be sufficient if it enables a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." To require the FBI to search every system would be to require more than a reasonable amount of effort.

(b) For the reasons indicated in our previous response to this question (on page 66 of transcript of April 10 hearings as provided by us for the record), the agency does not have an obligation to inform requesters that it has not conducted a complete search of all filing systems where requesters ask for any agency records about themselves. While it would be consistent with the spirit of the law to inform requesters that a complete search of all filing systems had not been conducted, the law does not specifically require that agencies act in such a manner.

(c) As we informed the Subcommittee, the vast majority (perhaps 98 percent) of all FBI records appear in the central records system. It is only with respect to the other 2 percent of the records that a search of only the central records system would not reveal information on a requester. Therefore, in only a small percentage of all requests might it be misleading for the FBI to conduct a search of only its central records system without disclosing to the requester the extent of its search. If the Subcommittee feels this presents a problem in terms of public disclosure, it might be appropriate to discuss the matter with the Bureau and consider legislative change.

QUESTION 3: On page 9 of the report, you note that, of the FBI's 59 million index cards, 40 million cards (roughly two-thirds) are called "see references," which contain names of people connected to an incident under investigation but who are not the subject of a file. Does the FBI adequately inform requesters that in searching its files for requested documents, the "see references" are not checked?

ENCLOSURE I

ANSWER: In its final responses to requesters, the FBI does not use the term "see references" because a long and detailed explanation of the term would be required. However, if during the search of the index cards the FBI locates "see references" possibly pertaining to the requester, it so informs the requester by including the following paragraph in the response letter:

> "If you believe your name may have been recorded by the FBI incident to the investigation of other persons or some organization, please advise of the details describing the specific incident or occurrence and timeframe. Thereafter, further effort will be made to locate, retrieve, and process any such records."

We consider the FBI's response in the above instance to be adequate.

QUESTION 4: Would it be useful if the FBI included in its Privacy Act regulations a description of the structure of its files and of the search procedures used when processing an FOIA request? Should this description be provided to each requester?

ANSWER: We believe that such a description, printed in the Federal Register, would be useful and serve to facilitate public access to FBI files. On the other hand, we do not believe that this description needs to be provided to each requester.

QUESTION 5: The GAO report says, on pp. 38-39, that Project Onslaught reduced the backlog, but did not eliminate it. The report refers to its high cost. Could the backlog have been similarly reduced by other, less costly means? By how much do you think the backlog can be reduced, as a practical matter? Should this reduction be attempted on a crash basis or by gradual attrition? If on a crash basis, by what specific method?

ANSWER: We do not believe that the backlog could have been reduced as quickly as it was by any other, less costly means. The FBI's primary objective was to eliminate the backlog within one year. To accomplish this objective, a concentrated effort such as "Project Onslaught" was required.

We believe that, rather than a crash program, a reduction of the backlog could be effectively accomplished through gradual attrition of the backlog. This gradual attrition would probably require the assignment of additional personnel to the FOI/PA branch. Unless a drastic increase in the backlog occurs, we do not believe that another "Project Onslaught" will be needed.

ENCLOSURE I

QUESTION 6: We have been given to understand that when agents arrived to work on Project Onslaught, sufficient preparations had not been made and, as a result, agents' time was not fully utilized. Was this the case and, if so, could you expand on this point?

ANSWER: The agents' time was fully utilized during both sessions of "Project Onslaught." However, the FOI/PA branch was unable to prepare sufficient cases for processing to warrant using the projected complement of 400 agents. During the first group's work session, officials found that the Initial Processing Unit (IPU) was not able to provide agents with cases for processing because

--more time than anticipated was needed to prepare cases for the agents' review, and

--IPU staffing was insufficient.

Thus, the second group's complement was reduced to 84 rather than the originally planned 202 in order to insure that all agents were fully utilized.

QUESTION 7: At page 62 of the report, it states that the FBI uses the b(7)(D) exemption of the Freedom of Information Act to withhold the identity of local police departments, credit bureaus, other commercial organizations and foreign law enforcement agencies, which supply information to the Bureau. It has come to our attention that the New York City Police Department's intelligence division requires, as a precondition for cooperation, that the identity of the New York City Police Department as a source of information be held confidential. (a) In your review of FBI files, is the non-disclosure of the identity of a cooperating law enforcement agency or commercial enterprise a common requirement for cooperating with the FBI? (b) Does an institution, such as a law enforcement agency or government, have an interest in personal privacy within the meaning of the Freedom of Information Act? (c) Does the FBI grant express promises of confidentiality under the Privacy Act to institutional sources of information? Under what circumstances? Are blanket promises of confidentiality ever made which cover all information received from an institutional source? (d) Does Nemetz v. Treasury Department (U.S. District Court, Civ. No. 77-C-574, (N.D. Ill. 1978)) suggest or require any changes in the FBI's procedures? (e) When the FBI treats an institution as a confidential source, is all the information from that institution withheld or does it depend on the nature of the information? If public information is received from a confidential source (e.g., arrest records), is the information or the source protected by the FBI? Can you suggest guidelines for distinguishing truly sensitive information from routine information that happens to have originated from a source that wishes to be confidential?

ENCLOSURE I

ANSWER: (a) In our review of the files, we found only one case of the 34 cases reviewed where the information was collected after the Privacy Act went into effect. In that case the police departments providing information requested confidentiality. None of the files processed under the Freedom of Information Act contained notations that confidentiality was desired by the local police departments. FBI officials have stated, however, that local law enforcement agencies have expressed their desire for confidentiality.

In our file review, we did not encounter any cases involving commercial organizations that requested confidentiality. FBI officials told us that many commercial organizations, such as banks and credit unions, have frequently asked that their identities and information provided to the FBI be kept confidential.

(b) In accordance with the Deputy Attorney General's guidance, present FBI policy states that organizations per se do not have a right of personal privacy. Information about the organizations' officials and even members is releasable to the extent that the material does not constitute an unwarranted invasion of their personal privacy.

This does not mean that a law enforcement agency or government may not be considered a confidential source. The answer to this question is in litigation at this time in Church of Scientology of California v. U.S. Department of Justice (No. 76-2506) which involves the appeal of the District Court's decision at 410 F.Supp. 1297 (C.D. Cal. 1976). The District Court held that the word "source" was not limited to individuals, but that a local police department could be a confidential source within the meaning of the Freedom of Information Act. Since this question is in litigation at this time, it would not be appropriate for us to answer it.

(c) The FBI does grant express promises of confidentiality to institutions at their specific request. This is done in investigations such as applicant and civil or administrative inquiries. Some examples of institutions which have expressly requested confidentiality for particularly sensitive information would include local police departments, credit bureaus, and foreign law enforcement agencies.

In the case of a source which the FBI contacts regularly, the FBI applies a blanket promise of confidentiality to all its present and future contacts with the source if the source desires. However, even with a blanket promise of confidentiality, current FBI policy is to segregate and release as much of a source's information as possible without identifying that source.

ENCLOSURE I

(d) In Nemetz v. Treasury Department, the court reiterated the requirements in exemption (k)(5) of the Privacy Act, 5 U.S.C. 552a(k)(5), that the exemption applied only if there was an express promise of confidentiality and then only to the extent disclosure would reveal the source's identity. The agency also must have adopted regulations invoking the exemption. 5 U.S.C. 552a(k)(5) authorizes agencies to exempt from disclosure under the Privacy Act:

> "[I]nvestigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of the source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence."

The court also held that information that cannot be withheld under the above provision must be released even though it meets the requirments of one of the privacy exemptions of the Freedom of Information Act (5 U.S.C. 552(b)(6) and (b)(7)(C)). 5 U.S.C. 552(b)(6) exempts from mandatory disclosure under the Freedom of Information Act personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. 552(b)(7)(C) exempts from mandatory disclosure under the Freedom of Information Act investigatory records compiled for law enforcement purposes to the extent production would constitute an unwarranted invasion of personal privacy.

In the Nemetz case, plaintiff sought access to background investigation information obtained by the Secret Service pursuant to plaintiff's application for employment. The Government argued, among other things, that the identities of the individual sources were protected by the privacy exemptions of the Freedom of Information Act. However, the court pointed out section (q) of the Privacy Act, 5 U.S.C. 552a(q), directs that an agency may not rely on a Freedom of Information Act exemption to withhold a record that is accessible under the Privacy Act. Thus, to justify withholding information identifying confidential sources in this (Nemetz) case, the court said, defendants must meet the requirements of section (k)(5) of the Privacy Act.

ENCLOSURE I

We understand that the FBI does not use exemption (b)(7)(D) (which exempts from mandatory disclosure under the Freedom of Information Act law enforcement records to the extent production would disclose the identity of a confidential source) to withhold from a requester investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information unless disclosure would reveal the identity of a source who furnished information under an express (or, before the Privacy Act was passed an implied) promise of confidentiality. In other words, the FBI does not use a privacy exemption of the Freedom of Information Act to withhold information that is accessible under the (k)(5) exemption of the Privacy Act. Thus, from what we know of FBI procedure, it is fully consistent with the Nemetz decision.

(e) Whether the FBI releases information from a confidential source or not depends on the nature of that information. Under present FBI policy, a release of some information is allowed when that information will not identify the source.

In most cases, the FBI releases public information but still protects the source of that information. FBI officials have told us that if the requester has previously furnished the FBI an accounting of his criminal arrests, the FBI's normal procedure would be to release the arrest record and the source's identity under the theory that the requester obviously is aware of this information. However, if the FBI was not advised of the criminal record by the requester, it would still release the information but protect the source.

We believe that the FBI could describe and exemplify the differences between routine and sensitive information received from a confidential source. For example, the FBI could separate routine public information, such as arrest records obtained from local police departments, from the more sensitive intelligence-type information developed by local police officers. A discretionary release could be made of all the routine information on the basis that the requester is already aware of such information. For the intelligence-type information, the FBI could release only that information which would not identify the source. Because of the deep concerns expressed by local law enforcement agencies over the release of their material, it can be expected that these agencies will object to the above discretionary policy. This may result in local law enforcement agencies refusing to cooperate with the FBI.

ENCLOSURE I

We recently began a review of whether the Freedom of Information and Privacy Acts are having an erosive effect on law enforcement agencies' abilities to gather and exchange information and we are studying this issue in more detail. This review is being conducted for the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee.

QUESTION 8: Please supply us with a full copy of the March 30, 1978, letter from Assistant Attorney General for Administration, Kevin D. Rooney, commenting on the GAO report, which appears in abbreviated form at pages 87-92 of the report.

ANSWER: A copy of the letter is contained in enclosure II.

[Subcommittee note: enclosure II available in subcommittee files.]

APPENDIX ———.—JUSTICE DEPARTMENT AMENDED RESPONSE TO GAO RECOMMENDATIONS OF APRIL 10, 1978

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

SEP 11 1978

Honorable Jack Brooks
Chairman
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

In compliance with Section 236 of the Legislative Reorganization Act of 1970, the following comments are provided to your Committee in response to the Comptroller General's report dated April 10, 1978, entitled "Timeliness and Completeness of FBI Responses to Requests Under Freedom of Information and Privacy Acts Have Improved" (GGD-78-51).

The Department prepared a detailed response to the GAO draft report which is incorporated as Appendix V in the final report. Our comments on the draft report continue to reflect the Department's views on the conclusions and recommendations contained in the final report. It is our purpose in this letter to update actions taken on some of the recommendations contained in the report as well as elaborate on some of the observations previously made in the draft report.

As stated in our earlier response, the Department has been taking advantage of every feasible opportunity to inform Congress of the serious problems created by the time limits and substantive language of the Freedom of Information (FOIA) and Privacy Acts (PA), particularly the FOIA. For this reason, the Department welcomed GAO's intensive study in this area. The study produced suggestions of value in fulfilling a mandate of openness by the Federal government. Unfortunately, none of GAO's recommendations suggested any possible means of expanding productivity in order to cope with the ever increasing number of requests received by the FBI. Faced with a mandated FOI/PA budget reduction of 20 percent for fiscal year 1979, the FBI will be hard-pressed to respond to future FOI/PA requests in a timely manner unless some legislative revision is made to alleviate the burden.

The FBI is continuing to study various proposals that will offer a feasible resolution to replacing agent supervisors with qualified personnel. The decision to effect further changes hinges not only upon the availability of support personnel who possess management potential or experience, but also on the FBI's perception of whether the job requires investigative experience and a law trained individual. Currently, the immediate supervisors of analysts are law trained special agents who have served as field investigators. The primary goal of the Department is to comply with FOI/PA requirements, but in doing so, we are committed to improving both processing efficiency and quality of the response.

A major concern of both DEA and the FBI continues to be the problem of meeting the policies of the FOIA, the courts and the Department, and yet be assured that confidential source information is adequately protected. Subjective evaluations are not adequate to protect such information. There is always potential harm from releasing any report or information about or from confidential informants, or releasing any report or information which might harm future law enforcement efforts or the officers involved.

In conformity with GAO's recommendation to provide more information to requesters, the FBI plans to provide more information in initial disclosures. All future responses will include the total number of pages reviewed for release as well as marginal notations on partially excised pages. If applicable, comments will be provided to explain why pages were exempted from release. Further, the initial response will specify which record systems were searched and include a statement that the review and processing of records identified within the Central Records System was limited to files maintained at FBI Headquarters. Requesters will also be advised that if they desire a search of field office files for any investigations not reported to Headquarters, they should write directly to the field offices they believe undertook such investigations. The FBI will also advise requestors that a search for retrieval of cross-reference or positive identification material will be made

if the requester can provide sufficient data to permit the search without imposing an undue burden upon FBI operations. A continuation page attached to the form response presently used will continue to be included, thereby providing additional space for other explanatory comments deemed appropriate to resolve questions peculiar to a given request.

Implementation of the above procedures began June 1, 1978. Because material currently being reviewed does not include marginal notations, several weeks lag time is anticipated, particularly for voluminous requests, before all changes are evident.

The GAO report also suggested that the FBI consider waiving duplication fees when the cost of collection is more than the fee itself. After performing a cost analysis of the procedures involved in billing requesters and receiving, processing and depositing checks received for FOIA/PA releases, the FBI has decided to raise the minimum fee below which payment shall be waived from $3 to $25. Any fee in excess of $25 will continue to be subject to waiver at the agency's discretion, subject to Department of Justice regulations and the statutory guide of a demonstrable public interest being served by reduction or waiver.

Our concerns relating to the remaining GAO recommendations were adequately addressed in Appendix V of the report.

We appreciate the opportunity to comment on the report. Should you desire any additional information, please feel free to contact us.

Sincerely,

Kevin D. Rooney
Assistant Attorney General
for Administration

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